THE

LAW OF CONTRACTS

FOR

WORKS AND SERVICES

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BY

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OF THE MIDDLE TEMPLE, SPECIAL PLEADER.

"Two are better than one; for they have a good reward for their labour."

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THE LAW OF CONTRACTS.

1. Almost every thing that we see around us, formed by the art of man, has been formed by means of contracts. The bread we eat, the clothes we wear, the house that shelters us, the iron road on which we travel, the puffing engine which draws us rapidly along, have each and all become what they are by means of contracts. God has given us all things in the rough. With the exception of air and water, nothing can be made available for the purposes of human life without labour,—few things without combined labour. The mutual consent of men to assist each other is a contract. By contracts they combine to labour, and by contracts are produced all the necessaries and luxuries which distinguish civilized from savage life.

The idea of a contract necessarily involves the idea of law. By means of law, the whole force of society is brought to bear on the man who fails in his engagement, to compel him to perform it, or to punish him for its breach. Law determines what contracts shall be enforced, how they shall be performed, and what shall be consequences of their breach.

The branch of the law of contracts to which the present volume is devoted is that relating to hire of labour, and principally so far as it concerns the erection of buildings and performance of other like works. Next to the marriage contract, this description of contract is perhaps of the earliest origin, since it has for its object the creation of property: all other contracts relating to property concern its transfer or preservation, and may therefore be said to be derived from and grow

out of this. Contracts for the hire of labour are of two sorts:—the contract to perform works, whereby one man agrees to do a certain work for another, as to build a house, and by which the contractor is bound to find all the labour and materials, and do every thing that may be necessary for the building of the house; and the contract to serve, whereby one man lets his personal services to another, either for a particular purpose or generally, and by which the servant is bound merely to do as much as he himself can towards the performance of the work for which he is engaged. By the first contract, the relation of contractor and employer is created; by the second, the relation of master and servant. The plan proposed is first to consider these two contracts together with reference to their legal validity, and then to treat of the duties and rights of each party to each contract separately.

With reference to their legal validity, contracts for the hire of labour, as well as all other contracts, are divisible into contracts which the law prohibits, and which it considers ought not to be performed, and which may be termed bad or illegal contracts; contracts which it will not enforce, and which therefore need not be performed, although it is not contrary to law to perform them, and which may be termed imperfect contracts; and contracts which it will enforce, and which therefore must be performed, and which are perfect contracts.

2. Contracts which the law prohibits, or illegal contracts, are those by which something is agreed to be done contrary to the general interests of society. They are illegal by common law, or by statute. Contracts illegal at common law are those that so plainly violate some great principle of morality or policy, that the Courts have of their own authority held them to be contrary to law. Contracts illegal by statute are those which infringe some provision which parliament in its wisdom has considered expedient for the preservation of order, the raising of the public revenue, or the protection of particular classes from the fraud, oppression, or competition of others.

3. Of illegal contracts at common law relating to the hire of

labour may be instanced a contract to print a libellous and indecent work (the 'Memoirs of Harriette Wilson'), in which case the printer failed to recover the price of the printing.[a] Contracts made for the purpose of defrauding or having a tendency to defraud third persons, are also illegal at common law. Thus a contract to recommend a person to an employment of trust, or as captain of a ship, for a reward to be paid to the recommender without the knowledge of the employer, is void;[b] but there is nothing illegal in such a contract if the employer is cognizant of the transaction.[c]

4. Contracts in total restraint of trade are also illegal and void by the common law, as oppressive on the party restrained, and injurious to society by depriving it of the industry of one of its members. A contract between a brass-founder and a firm of commission agents, that the firm should employ the brass-founder in executing orders received by them for brass-work, and that the brass-founder should not at any time work for any other person without the consent of the firm, but the firm were at liberty to employ any other person, and the brass-founder was at liberty to execute the order of any person within the city of London or within six miles, was held an unreasonable restraint of trade, and void, because the firm were not bound to find the brass-founder with full employment.[d] A bond given to a coal-merchant by his clerk, whereby the clerk bound himself not to follow or be employed in the business of a coal-merchant for nine months after he should have left the service of his employer, was held void, as a total restraint of trade for the nine months.[e]

5. Contracts in partial restraint of trade are sometimes beneficial to trade and industry, instead of being prejudicial, since a

[a] Poplett v. Stockdale, 2 Car. and Payne, 200.

[b] Waldo v. Martin, 4 B. and C. 325. Blackford v. Preston, 8 D. and E. 89. Card v. Hope, 2 B. and C. 672.

[c] Richardson v. Mellish, 2 Bing. 242.

[d] Young v. Timmings, 1 C. and J. 340. Sykes v. Dixon, 9 A. and E. 693.

[e] Ward v. Byrne, 5 M. & W. 548.

tradesman may be enabled to dispose of his business for a valuable consideration, or may be encouraged to take a servant into his confidential employment, if he can secure the purchaser or himself against competition by a contract of this description. To render a contract in partial restraint of trade binding, it should be made upon a good consideration, and the restraint should not be longer than is necessary for the protection of the party to be secured. Thus a master may lawfully bargain that his servant shall not work for any other person so long as he continues in his employment,[a] or that he shall not work for his customers,[b] or set up business within a limited distance,[c] after he shall have quitted his service.

6. A contract which is directly prohibited by statute is void, and cannot be enforced. A contract to do an act which a statute prohibits, or to do an act for the doing of which a statute has imposed a penalty, is by implication prohibited by the statute, and therefore void. A penalty implies a prohibition.[d]

When an act has been done which is expressly or by implication prohibited by statute, no compensation can be claimed for the performance; for either the parties agreed that it should be so done, in which case their contract was void, as contemplating a breach of the law, or the agreement was to do something lawful, and was not performed by the workman. Thus a printer who was employed to print a pamphlet, and did not print his name and place of residence on the first and last sheets as required by the statute 39 Geo. III. c. 79, s. 27, was held not entitled to recover any thing for the printing.[e]

[a] Pilkington v. Cooke, 15 M. and W. 657. Hartley v. Cummings, 4 Com. Bench, 247.

[b] Rannie v. Irvine, 7 M. and G. 969. Nicholls v. Stretton, 7 Beav. 42.

[c] Mallan v. May, 11 M. and W. 668.

[d] Bartlett v. Viner, Carth. 252. Cope v. Rowlands, 2 M. and W. 149.

[e] Bensley v. Bignold, 6 B. and Ald. 335.—39 Geo. III. c. 79, s. 27, is repealed by 2 & 3 Vict. c. 12, which contains a similar provision.

The object of the statute being to prevent the publication of libels, was understood as prohibiting the printing of books unless the name and address of the printer was printed thereon previous to publication.

It is not every breach of a statute, or omission to comply with its requisites in the performance of a contract, which will render the contract void, or disentitle the party performing it to the price of his labour. The object of the legislature and the motives of the parties to the contract are to be regarded. If the violation of the statute is collateral to the contract, or if in the course of performing the contract a breach of a statute is committed which was not contemplated by the parties when they agreed, the contract is not rendered unlawful. The point to be ascertained is, whether the legislature intended to prohibit the contract. Thus a sale of tobacco by a party who has no licence to deal in that commodity, or who has not his name painted over his door as required by the excise laws, is not void, although the statutes relating to the excise impose penalties on those who deal in tobacco without being licensed, or without having their names painted over their doors.[a] In these cases the statutory provisions are for the regulation of the general trading of parties, and are collateral to particular contracts, though made in the course of such trading. And the price of spirits sold and delivered without a permit, or with an irregular permit, may be recovered, because the violation of the statute was not contemplated by the contract.[b] The parties did not agree to infringe the statute, and were not bound to agree to observe it.

The object of the legislature is also to be considered in determining whether an agreement contrary to statute is void to all intents, or whether the parties are at liberty to make it valid by expressly dispensing with the statute. It seems that

[a] Johnson v. Hudson, 11 East, 180. Smith v. Mawhood, 14 M. and W. 452. Per Tindal, C. J., Ferguson v. Norman, 5 Bing. N. C. 84.

[b] Wetherell v. Jones, 3 B. and Ad. 221.

when a statute is passed for the purpose of protecting one contracting party from the fraud of the other, the benefit of the statute may be renounced by the party intended to be protected. The statute 17 Geo. III. c. 42, provided that all bricks made for sale should be of certain dimensions. Bricks were sold and delivered of smaller dimensions than specified in the statute, and the seller failed to recover the price; but the Court gave judgment against the seller on the ground that the bricks were bought as bricks of a proper size, and that the buyer did not know them to be of under size.[a]

But if the object of the legislature is to protect one party from the oppression of the other, in which case it is assumed that the party to be protected is not *sui juris*, or on equal terms with his co-contractor, or to protect the public or third persons, the contract is to all intents void, and no agreement to renounce the benefit of the law can be binding. The Truck Act and other Acts made for the protection of workmen against their employers are statutes of the one sort; the Act regulating printers is an instance of the other.

Such are some of the principles of law as to contracts rendered illegal by statutes which are applicable to contracts for works and services, and the statutes relating to such contracts.

7. Amongst the statutes affecting general contracts for works may be mentioned those for the better observance of the Lord's day. The statute 3 Car. I. c. 1, enacts, that no carrier with any horse or horses, nor waggon-man with any waggon or waggons, nor carman with cart or carts, nor wainman with any wain or wains, nor drover with any cattle, shall by themselves or any other travel upon the said day, upon pain that every person so offending shall lose and forfeit 20*s*. for every such offence; and that if any butcher by himself or any other for him, with his privity or consent, shall kill or sell any victual upon the said day, every such butcher shall for

[a] Law v. Hodson, 11 East, 300.

every such offence forfeit and lose the sum of 6*s*. 8*d*. And the statute 29 Car. II. c. 7, further enacts, that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day, or any part thereof,—works of necessity and charity only excepted; it imposes a penalty of 5*s*.

These statutes do not include all persons or all works; they extend only to the persons particularly mentioned in them, and to others of the same class, '*ejusdem generis*.' It has been decided that farmers[a] and attorneys[b] are not within the statutes, and a stage-coach proprietor may lawfully agree on a Sunday to carry a passenger on a journey upon that day, and must pay for a post-chaise if he fails to perform his contract.[c]

The works made illegal by the statute are only works done by tradesmen, &c. in their ordinary callings. A contract to do on Sunday work which is not in the ordinary calling of the tradesman, or a contract which is not in his ordinary calling, that is, the usual and every-day course of his business, made on Sunday, is not illegal. Thus a contract by a farmer for the hire of a labourer, made on Sunday, is binding.[d] And a contract by a farmer for letting out his stallion, though the contract be made and the purpose accomplished on Sunday, is according to law.[e] The sale of a horse on a Sunday by a person not a horse-dealer is legal;[f] but the sale of a horse on a Sunday by a horse-dealer is illegal, and no action can be brought for the price of the horse, or on a warranty given at the time of the sale.[g] The acts done on Sunday by tradesmen in their ordinary calling having simply no legal effect, except to subject them to the penalties imposed by the

[a] Rex v. Whitnash, 7 B. and C. 602. [b] Peate v. Dicken, 1 C. M. and R. 422. [c] Sandiman v. Breach, 7 B. and C. 96. [d] Rex v. Whitnash, 7 B. and C. 96. [e] Scarfe v. Morgan, 4 M. and W. 270. [f] Drury v. Defontaine, 1 Taunt. 131. [g] Fennell v. Ridler, 5 B. and C. 406.

statute, the fact of a contract having been in part made on Sunday does not affect the validity of any thing done on a subsequent week-day; and therefore, if goods are sold and delivered on the day of rest, the sale being simply void, a promise to pay for them on a subsequent week-day is, it seems, binding, as amounting to a new sale.[a] And if a contract is proposed to be made on a Sunday, but completed on another day, it is binding.[b] It seems also, that in the case of a Sunday contract, if it is within the ordinary calling of the one party and not of the other, the party who has infringed the statute is bound by it, and cannot take advantage of his own wrong to excuse himself from its performance: thus, where a horse-dealer sold a horse to a gentleman and warranted it sound on a Sunday, he was held bound by the warranty. The purchaser believed him to be a stage-coachman, and did not know that he was a horse-dealer.[c]

To apply these cases to contracts for work, it may be taken that if any work is done by a person to whom the statutes extend on a Sunday in his ordinary calling, no remuneration can be recovered for such work; and that if a contract is made for the performance of such work on Sunday, it is illegal, and need not be performed; and if a contract is made on a Sunday with a workman, which contract is within the ordinary calling either of the employer or the employed, it cannot be enforced by the party who has infringed the statute; but if work is on a week-day done and accepted in pursuance of such contract, the acceptance of the work will be equivalent to a new contract made on the week-day to pay the workman a reasonable remuneration for his labour, though it is doubtful whether the transaction on the Sunday can be referred to at all, either to estimate the price to be paid, or to ascertain the work to be done.

This partial enactment of the Fourth Commandment, sanc-

Williams v. Paul, 6 Bing. 653. Simpson v. Nicholls, 3 M. and W. 240.
Bloxsome v. Williams, 3 B. and C. 233. [c] Ibid.

tioned by a 5s. penalty, appears rather ridiculous, if it is not worse. It may be doubted whether man's duty towards God is a proper subject for human laws. It is not in the power of an act of parliament to make a man pass his sabbath religiously; and if he is unwilling to do so, he may as well work in his ordinary calling as do any thing else.

The object of the Divine law, if we may presume to offer a conjecture on such a subject, is to enable a man to show to his fellows his faith in and love to God. Obedience to such a law must be the offspring of free-will. Human laws apply only to the unwilling. A human law prohibiting the same act which the Divine law prohibits does not tend to assist or enforce the Divine law, but the contrary. It in appearance confounds the religious and the irreligious, by preventing the irreligious from doing what they are willing to do, thereby making them appear to be religious when they are not really so. A Divine law can only be enforced by persuasion; and it is the duty of the religious part of the community, or those appointed for that purpose, to persuade the irreligious to obedience. The tendency of a law which in appearance confounds the two classes, is to conceal from the one class the extent of the duty they have to perform, and to weaken their efforts: it resembles the surface-healing of a wound, which delays the cure.

8. The statutes regulating the employment and time of labour of children and females in factories and print-works may also be referred to as imposing restraints upon contracts relating to the hire of labour. By these statutes, no child under the age of 8 years can be employed in any factory or print-work. No child under the age of 13 can be employed in any factory for more than six hours and a half per day, with certain exceptions; and no young person under the age of 18 can, nor can any female, be employed in any factory more than ten hours per day. In print-works, no child under the age of 8, or young person under the age of 13, can be employed without a medical certificate; and no child or female

can be employed at night, *i. e.* between 10 in the evening and 6 in the morning.[a]

9. Another important statute affecting the validity of contracts of this description is the 1 & 2 Wm. IV. c. 37, commonly called the Truck Act. It is entitled, '*An Act to prohibit the payment in certain trades of wages in goods or otherwise than in the current coin of this realm.*' After reciting that "it is necessary to prohibit the payment, in certain trades, of wages in goods or otherwise than in the current coin of the realm," it enacts, "That in all contracts for the hiring of any artificer in any of the trades hereinafter enumerated, or for the performance by any artificer of any labour in any of the said trades, the wages of such artificer shall be made payable in the current coin of this realm only, and not otherwise; and that if in any such contract the whole or any part of such wages shall be made payable in any manner other than in the current coin aforesaid, such contract shall be illegal, null, and void."[b]—"If in any contract hereafter to be made between any artificer in any of the trades hereinafter enumerated and his employer, any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be illegal, null, and void."[c]—"The entire amount of the wages earned by or payable to any artificer in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer of or in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as

[a] 42 Geo. III. c. 73; 3 & 4 Wm. IV. c. 103; 7 & 8 Vict. c. 15; 10 & 11 Vict. c. 29, relate to factories;—8 & 9 Vict. c. 29, and 10 & 11 Vict. c. 70, to print-works.

[b] S. 1. [c] S. 2.

hereinafter mentioned, shall be illegal, null, and void."[a]—"Every artificer in any of the trades hereinafter enumerated shall be entitled to recover from his employer in any such trade, in the manner by law provided for the recovery of servants' wages, or by any other lawful ways and means, the whole or so much of the wages earned by such artificer in such trade as shall not have been actually paid to him by such employer in the current coin of this realm."[b]—"In any action, suit, or other proceeding to be hereafter brought or commenced by any such artificer as aforesaid against his employer, for the recovery of any sum of money due to any such artificer as the wages of his labour in any of the trades hereinafter enumerated, the defendant shall not be allowed to make any set-off nor to claim any reduction of the plaintiff's demand by reason or in respect of any goods, wares, or merchandise had or received by the plaintiff as or on account of his wages, or in reward for his labour, or by reason or in respect of any goods, wares, or merchandise sold, delivered, or supplied to such artificer, at any shop or warehouse kept by or belonging to such employer, or in the profits of which such employer shall have any share or interest."[c]—"No employer of any artificer in any of the trades hereinafter enumerated shall have or be entitled to maintain any suit or action in any Court of Law or Equity against any such artificer, for or in respect of any goods, wares, or merchandise sold, delivered, or supplied to any such artificer by any such employer whilst in his employment, as or on account of his wages or reward for his labour, or for or in respect of any goods, wares, or merchandise sold, delivered, or supplied to any such artificer at any shop or warehouse kept by or belonging to such employer, or in the profits of which such employer shall have any share or interest."[d]

"If any such artificer as aforesaid, or his wife or widow, or if any child of any such artificer, not being of the full age of twenty-one years, shall become chargeable to any parish or

[a] S. 3. [b] S. 4. [c] S. 5. [d] S. 6.

place, and if within the space of three calendar months next before the time when any such charge shall be incurred, such artificer shall have earned or have become entitled to receive any wages for any labour by him done in any of the said trades, which wages shall not have been paid to such artificer in the current coin of this realm, it shall be lawful for the overseers or overseer of the poor in such parish or place to recover from the employer of such artificer, in whose service such labour was done, the full amount of wages so unpaid, and to proceed for the recovery thereof by such ways and means as such artificer might have proceeded for that purpose; and the amount of the wages which may have been so recovered shall be employed in reimbursing such parish or place all such costs and charges incurred in respect of the person or persons so become chargeable, and the surplus shall be applied and paid over to such person or persons."[a]

"Provided that nothing herein contained shall be construed to prevent or to render invalid any contract for the payment or any actual payment to any such artificer as aforesaid of the whole or any part of his wages, either in the notes of the governor and company of the bank of England, or in the notes of any person or persons carrying on the business of a banker and duly licensed to issue such notes in pursuance of the laws relating to His Majesty's revenue of stamps, or in drafts or orders for the payment of money to the bearer on demand, drawn upon any person or persons carrying on the business of a banker, being duly licensed as aforesaid, within fifteen miles of the place where such drafts or orders shall be so paid, if such artificer shall be freely consenting to receive such drafts or orders as aforesaid; but all payments so made, with such consent as aforesaid, in any such notes, drafts, or orders as aforesaid, shall, for the purposes of this Act, be as valid and effectual as if such payments had been made in the current coin of the realm."[b]

[a] S. 7.

[b] S. 8. Ss. 9 to 18 relate to penalties, their recovery and application

"Nothing herein contained shall extend to any artificer, workman, or labourer, or other person engaged or employed in any manufacture, trade, or occupation, excepting only artificers, workmen, labourers, and other persons employed in the several manufactures, trades, and occupations following; (that is to say) in and about the making, casting, converting or manufacturing of iron or steel, or any parts, branches, or processes thereof; or in or about the working or getting of any mines of coal, iron, stone, limestone, salt, rock; or in or about the working or getting of stone, slate, or clay, or in the making or preparing of salt, bricks, tiles, or quarries; or in or about the making or manufacturing of any kinds of nails, chains, rivets, anvils, vices, spades, shovels, screws, keys, locks, bolts, hinges, or any articles or hardwares made of iron or steel, or of iron and steel combined, or of any plated articles of cutlery, or of any goods or wares made of brass, tin, lead, pewter, or other metal, or of any japanned goods or wares whatsoever; or in or about the making, spinning, throwing, twisting, doubling, winding, weaving, combing, knitting, bleaching, dyeing, printing, or otherwise preparing of any kinds of woollen, worsted, yarn, stuff, jersey, linen, fustian, cloth, serge, cotton, leather, fur, hemp, flax, mohair, or silk manufactures whatsoever; or in or about any manufactures whatsoever made of the last-mentioned materials, whether the same be or be not mixed one with another; or in or about the making or otherwise preparing, ornamenting, or finishing of any glass, porcelain, china, or earthenware whatsoever, or any parts, branches, or processes thereof, or any materials used in any of such last-mentioned trades or employments; or in or about the making or preparing of bone, thread, silk or cotton lace, or of lace made of any mixed materials." [a]

"Nothing herein contained shall extend to any domestic servant or servant in husbandry." [b]

[a] S. 19.

[b] Ss. 20, 21, and 22, relate to the magistrates qualified to act in enforcing penalties.

"Nothing herein contained shall extend or be construed to extend to prevent any employer of any artificer, or agent of any such employer, from supplying or contracting to supply to any such artificer any medicine or medical attendance, or any fuel, or any materials, tools, or implements to be by such artificer employed in his trade or occupation, if such artificer be employed in mining, or any hay, corn, or other provender to be consumed by any horse or other beast of burden employed by any such artificer in his trade or occupation; nor from demising to any artificer, workman, or labourer employed in any of the trades or occupations enumerated in this Act, the whole or any part of any tenement, at any rent to be therein reserved; nor from supplying or contracting to supply to any such artificer any victuals dressed or prepared under the roof of any such employer, and there consumed by such artificer; nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent, or for or in respect of any such medicine or medical attendance, or for or in respect of such fuel, materials, tools, implements, hay, corn, or provender, or of any such victuals dressed and prepared under the roof of any such artificer for any such purpose as aforesaid: Provided always, that such stoppage or deduction shall not exceed the real and true value of such fuel, materials, tools, implements, hay, corn, and provender, and shall not be in any case made from the wages of any such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer."[a]

"Nothing herein contained shall extend or be construed to extend to prevent any such employer from advancing to any such artificer any money to be by him contributed to any friendly society or bank for savings duly established according to law, nor from advancing to any such artificer any money

[a] S. 23. An agreement to deduct rent need not be in writing: Chawner v. Cummings, post.

for his relief in sickness, or for the education of any child or children of any such artificer, nor from deducting or contracting to deduct any sum or sums of money from the wages of such artificer for the education of any such child or children of such artificer, and unless the agreement or contract for such deduction shall be in writing, and signed by such artificer."[a]

"In the meaning and for the purposes of this Act, all workmen, labourers, and other persons in any manner engaged in the performance of any work, employment, or operation of what nature soever, in or about the several trades and occupations aforesaid, shall be and be deemed 'artificers;' and within the meaning and for the purposes aforesaid, all masters, bailiffs, foremen, managers, clerks, and other persons engaged in the hiring, employment, or superintendence of the labour of any such artificers, shall be and be deemed to be 'employers;' and within the meaning and for the purposes of this Act, any money or other thing had or contracted to be paid, delivered, or given as a recompence, reward, or remuneration for any labour done or to be done, whether within a certain time or to a certain amount, or for a time or an amount uncertain, shall be deemed and be taken as the 'wages' for such labour; and within the meaning and for the purposes aforesaid, any agreement, understanding, device, contrivance, collusion, or arrangement whatsoever, on the subject of wages, whether written or oral, whether direct or indirect, to which the employer and artificer are parties, or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an obligation on the other of them, shall be and be deemed a 'contract.'"[b]

Upon this statute it has been decided, that, with the exception of the 23rd section, it prohibits the *payment* only of wages otherwise than in money, and does not apply to deductions or charges upon wages which are agreed to at the time between the master and the workman, or which are according

[a] S. 24.

[b] S. 25.

to the usage of trade (such usage being, in effect, part of the agreement between the parties). In this case, the balance remaining after the deduction or charge is the amount payable as wages. A frame-work knitter was employed in weaving gloves by a middle-man, to be paid an agreed gross price per dozen pairs of glove-fingers made by him, subject to certain charges and deductions, viz.—1*s.* 6*d.* per week for the use of the frames, which were furnished by the employer; 1*s.* 6*d.* per week as a remuneration for the use of the employer's premises in which the work was to be performed, for the standing-room of the frame, and for the trouble and loss of time of the employer in procuring and conveying the materials, and for his responsibility to the master manufacturer for the due return of the manufactured articles, for sorting the goods and re-delivering them at the warehouse of the master manufacturer; 7*d.* per week for winding the yarn, which operation was performed by a child, whose wages were 6*d.* per week, and the remaining 1*d.* was for the use of the winding machinery; and 1*d.* in each shilling on the amount of the workman's earnings above 14*s.* per week, as a compensation to the middle-man for a per-centage paid to the master manufacturer on the amount of goods manufactured by machinery rented by him. These deductions were held not contrary to the Truck Act. It was also determined that they were not stoppages or deductions for which an agreement in writing was required by the 23rd section.[a]

In another case, it was decided that the statute is confined to persons who enter into contracts to employ their personal services, and to receive payment for such service in wages; and therefore that a sub-contractor for excavating a certain portion of railway cutting, who employed labourers to assist him in the performance of his contract, was not a labourer within the meaning of the Truck Act, although he did part of the work himself.[b]

[a] Chawner v. Cummings, 8 Q. B. 311. (1846.)
[b] Riley v. Warden, 2 Excheq. 59. (1848.)

Illegal contracts are sometimes divisible, that is, good in part, and bad in part; and sometimes indivisible, or entirely bad.

Where two acts are agreed to be done, one legal and the other illegal, the contract is divisible, and good as to the legal act, but bad as to the other. Thus, where on the sale of a business the seller agreed not to carry on business within London or 600 miles thereof, the contract was held good so far as it restrained him from carrying on business in London, such being a reasonable restraint of trade, but void as to the 600 miles.[a]

But if a single act is agreed to be done, or a sum of money to be paid in consideration of something illegal and something legal, the whole is void;[b] because the act to be done or money to be paid is in part a reward for an illegal act, and it cannot be ascertained what part or how much is to be done or paid for the legal and what part or how much for the illegal act.

10. Imperfect contracts are either contracts made without consideration, or contracts made with incapable persons, or contracts obtained by undue means, or contracts not sufficiently authenticated.

Contracts considered with reference to the solemnity of their execution are of two sorts,—specialties or simple contracts. A specialty must be in writing, on paper or parchment, and sealed and delivered as a deed: a simple contract may be either in writing or verbal.

What a party agrees to do by deed, he is bound to perform, although his agreement is unilateral, that is, without any thing being given or done, or agreed to be given or done, by the other contracting party: thus if a man by deed agrees to build a house, he must do so, although he is to receive nothing for his pains. A specialty is higher in class and degree than

[a] Mallan v. May, 13 M. and W. 517. Green v. Price, 13 M. & W. 695. Price v. Green, 16 M. and W. 346.

[b] Scott v. Gilmore, 3 Taunt. 226.

a simple contract; and if a man first agrees to do a thing by a simple contract, and subsequently agrees to do the same thing by deed, the agreement by simple contract is merged and extinguished by the contract by deed. On the other hand, if he first agrees to do a thing by deed, and afterwards a simple contract is made that he shall do something in lieu of the thing covenanted to be done, he is bound to perform his covenant notwithstanding. A subsequent specialty extinguishes a simple contract, but a subsequent simple contract cannot vary or alter the obligation of a deed. Contracts by deed are called covenants; simple contracts are called promises or agreements.

11. Simple contracts are not binding unless founded upon a consideration, which is defined to be something given or done, or agreed to be given or done, by the promisee, beneficial to the promiser, or prejudicial to the promisee. There must be something given or done, or agreed to be given or done, by each party to the contract. The performance of a gratuitous unilateral promise is as gratuitous or honorary as the promise: this is either founded on the notion that it is not the intention of the parties that such a promise shall be binding and irrevocable, or on the notion that the party with whom the promise is made, and who neither gives nor agrees to give any thing in exchange for it, loses nothing by the promise not being performed.

An action was brought against a carpenter, who had been retained by the plaintiff to repair his house before a given day, and had accepted the retainer, but did not perform the work, whereby the plaintiff's house was damaged. The action was held not maintainable, because it did not appear that the defendant was to receive any consideration, or that he had entered upon the work: had he entered upon the work, the plaintiff suffering him to do it would have been a sufficient consideration for an agreement by him to do it properly.[a]

[a] Elsee v. Gatward, 5 D. and E. 143.

In another case, the defendant agreed to remain with the plaintiff two years for the purpose of learning the business of a dress-maker, and left the service before the expiration of the term. The Court held that she was not liable to an action, because there was no agreement on the part of the plaintiff to teach or employ her.[a]

In Sykes v. Dixon,[b] Bradley agreed to work for Sykes in making powder-flasks, and for no other person, for twelve months: he left Sykes's service within twelve months, and entered into the service of Dixon. The Court held that no action could be maintained against Dixon for harbouring Bradley, because the agreement was void for want of consideration, there being no agreement on the part of Sykes to employ Bradley. And although it was urged that an agreement to pay Bradley for his work would be implied, which would form a sufficient consideration, the Court said that would be the same in any service to which Bradley might engage himself, and was no consideration for the contract to serve for a specified time. The obligation to pay wages would arise from the service performed, and not before, and there was no express agreement to pay wages for the period during which Bradley agreed to serve.

A promise to reward a man for doing that which he is under a previous obligation to do is without consideration. The master of a ship promised to pay a seaman five guineas above his wages for doing some extra work in navigating the ship. The promise was void, because the seaman was previously bound to obey all the master's orders in navigating the vessel.[c]

In the course of a voyage some seamen deserted, and the captain promised to divide their wages amongst the rest of the crew. Lord Ellenborough held the promise to be void for want of consideration, saying, "Before the ship sailed from London, the sailors had undertaken to do all they could, under all the emergencies of the voyage: they had sold all their

[a] Lees v. Whitcomb, 5 Bing. 34.
[b] 9 A. and E. 693.
[c] Harris v. Watson, Peake, 102.

services until the voyage should be completed. If the captain had capriciously discharged the two men who were wanting, the others might not have been compellable to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages."[a]

12. It is essential to every contract that there should be two parties to it, and it is essential to the legal validity of every contract that each party to it should be in law competent to contract. If either party is incompetent, the contract is imperfect. Of such contracts, some are void and incapable of being confirmed or enforced; others are voidable, and capable of being confirmed.

A married woman is incompetent to contract, and her contract is at law absolutely void. This is because she is incapable by law of possessing property during her coverture, and therefore cannot have the means of performing a contract. This disability continues notwithstanding a divorce *à mensâ et thoro,* which is merely a personal separation. But after a divorce *à vinculo matrimonii,* by which the marriage is dissolved, or if the husband has been convicted of felony and transported, during his sentence, which is a civil death, she is capable of contracting. She is capable of acting as agent for her husband, or any other person, in making a contract: in such case the principal, and not the married woman, is at law the party to the contract.

In Equity, by means of trustees, a married woman may have a separate estate, and her contract is sometimes a charge upon her estate which is enforced by a Court of Equity.

13. Persons of unsound mind, whilst in a state of insanity, and persons in such a state of drunkenness as to be deprived of the use of their judgment and understanding,[b] are incapable of making contracts, because they cannot give that free and intelligent consent which is essential to a contract. But from

[a] Stilk v. Myrich, 2 Campb. 317; 6 Esp. 129.

Gore v. Gibson, 13 M. and W. 623.

the necessity of the case, the contracts of lunatics who are not under control, made for the necessaries of life, and for things and services suitable to their degree and station in life, are binding upon them.[a]

14. The contracts of infants, or persons under the age of twenty-one years, are in some cases valid, in some voidable, and in some void.

Contracts to pay a reasonable price for necessaries supplied to the infant or his family are binding on him. Necessaries include necessary meat, drink, apparel, physic, and good teaching and instruction, whereby he may profit himself afterwards.[b] But if an infant has houses, and it is necessary to put them in repair, and he makes a contract for the repairs, he is not bound. No contract binds him but such as concerns his person.[c] The infant who has property ought to have a guardian to take care of it.

An agreement to serve for wages is, according to the opinion of Lord Abinger, generally speaking, binding on an infant,[d] assuming of course that his station in life renders it necessary for him to earn his livelihood during his infancy; and if an infant labourer deserts his service, he may, it has been said by Bayley and Littledale, JJ., be punished under the Master and Servant's Act.[e] But if the terms of the agreement are inequitable, and not beneficial to the infant, the agreement is void, and he cannot be punished for its breach; as if the agreement professes to bind the infant to serve for a term, but leaves the master free to stop his work and wages whenever he chooses.[f]

According to Fitzherbert, an infant of the age of twelve is

[a] Bagster v. Earl of Portsmouth, 4 B. and C. 170. Dane v. Viscountess Kirkwall, 8 C. and P. 679.

[b] Co. Lit. 172, a.

[c] Per Haughton, J., Tirrell's case, 2 Rol. Rep. 271. Anon. 3 Salk. 196.

[d] Per Lord Abinger, Wood v. Fenwick, 10 M. and W. 204.

[e] Per Bayley, J., and Littledale, J., Rex v. Chillerford, 4 B. and C. 101.

[f] Rex v. Lord, 12 Jur. 1001.

bound by his covenant to serve in husbandry.[a] The Factory Acts may perhaps be considered as recognizing the validity of the contracts to serve by infants of the age of eight years.

The authority of Fitzherbert ought perhaps to be understood as confined to simple contracts of infants, since it has been held that a covenant by an infant in an apprentice deed is voidable by him.[b] The reason that an infant cannot bind himself by deed may be, that the validity of his contracts depends upon the nature and amount of the consideration, and in contracts by deed the consideration is immaterial. By custom of London, an infant is bound by his covenant in an apprentice deed, and may be sued thereon.[c]

A deed which may be beneficial to an infant is merely voidable by him, and until avoided, it stands good. An infant slave in the West Indies entered into a deed by which he covenanted to serve his master for a certain term: the Court held that it was not void, because it was beneficial to the infant, inasmuch as it operated to emancipate him, and therefore a party who had seduced the infant from the service of his master was liable to an action.[d]

But a contract which the Court can pronounce to be prejudicial to the infant is void, as is a bond with a penalty.[e]

15. If any fraud is practised by one party on the other in inducing him to enter into a contract, the contract may be avoided by the party defrauded. Fraud consists in some false statement which the party making it knows to be false, or some studied concealment or suppression of a material circumstance by which the other party is deceived. If the statement is obviously false, and the truth can be ascertained by the exercise of ordinary caution, the contract is not void for fraud. If a man is injured by a contract made upon such a statement, it is rather the effect of his own carelessness than of the fraud of the other. Thus, where a carrier agreed

[a] F. N. B. 168. [b] Gylbert v. Fletcher, Cro. Car. 179.
[c] Horn v. Chandler, 1 Mod. 271. [d] Keane v. Boycott, 2 H. Bl. 511.
[e] Bayl's v. Dineley, 3 M. and S. 481.

with the defendant to carry a load of wool at so much a hundred weight, and inquired of him how much it weighed, and the deponent said 8 cwt. (the wool, in fact, weighed 2000 lbs., and in consequence the carrier's horses were overstrained and killed), the Judges intimated their opinions that the carrier had no remedy, because he was in default in not weighing the goods before he received them; and he abandoned his action.[a]

A person who by false and fraudulent representations of his ability to cure a cancer without cutting, by means of sovereign remedies, induced another, afflicted with that disease, to employ him, was held not entitled to recover any remuneration for his services or medicines, by reason of the contract of employment being void for fraud.[b]

The fraud of the fraudulent party entitles the party defrauded to avoid the contract so soon as he discovers the fraud, and he cannot be compelled to perform it, and may maintain an action to recover any damage he has sustained by reason of the fraud. But if he does perform his part of the contract, he cannot sue the other party upon any other contract than that actually made. A man agreed to cart away some rubbish for £15, in consequence of a fraudulent representation by his employer as to the depth of the rubbish. He performed the work, and claimed £20 as the value of his labour. It was decided that he was not entitled to more than the agreed price, since although the fraud of the defendant entitled him to avoid the contract, it did not authorize him to impose on the defendant terms to which he had not agreed: there being an express agreement as to the price, the law would not imply one. Parke, B., said, "Upon discovering the fraud, the plaintiff should immediately have declared off, and sought compensation in an action for deceit."[c]

If, after discovering the fraud, the party defrauded proceeds

[a] Baily v. Merrell, 3 Bulst. 94.
[b] Hupe v. Phelps, 2 Stark. 480.
[c] Selway v. Fogg, 5 Mee and Wels. 83.

with the contract, or does any act by which he treats it as valid, he is bound by it. The election which the law gives to avoid the contract, is an election which he may waive when he knows of his situation.[a] In cases of fraud, the contract is imperfect because of the want of the free consent of one of the contracting parties: when the party defrauded, after discovering the fraud, assents to the contract, he supplies the free consent which was wanting, and the contract becomes perfect.

16. Of contracts which are imperfect by reason of not being properly authenticated may be instanced the simple contracts of corporations. A corporation is an artificial being, or body politic, existing by prescription, or created by charter, or act of parliament, or by registration under the Joint Stock Companies' Act. Railway companies are corporations by act of parliament: so are the guardians of a poor-law union. In the case of a corporation, the community has a legal existence distinct from the individuals composing it, and may possess property and make contracts which are binding on the corporate property.

Generally speaking, a corporation can only contract by deed under the corporate seal. The guardians of Billericay Union made a contract by deed with Mr. Lamprell, a builder, for building their union workhouse. The works were to be done under the superintendence of Messrs. Scott and Moffat, architects, and it was provided that if the architects required alterations or additions in the progress of the works, they should give Lamprell written instructions for the same, signed by them, and that he should not be deemed to have authority to do such additional works without such written instructions. The contract price was £5500. Many extra works were done, which were valued by Scott and Moffat at £3133, and there were several letters, some from Scott and some from Moffat, approving of the extra works. The guardians had paid £6300, and had accepted and acquiesced in the addi-

[a] Campbell v. Fleming, 1 Ad. and El. 40.

tional works. An action was brought by Lamprell against the guardians for the balance of the contract price and the extra works. The Court of Exchequer, with great reluctance, decided against him, saying that his claim was apparently the most just and reasonable. The ground of the decision was, that the guardians, being a corporation, could only be bound by the deed, and the orders for the extra works were not according to the deed. They held that a written order signed by one of the architects was not sufficient to render the guardians liable, the deed requiring it to be signed by both; and that a writing signed by the architects during the progress of the extra works, or after their completion, was not sufficient. They also held that Lamprell could not appropriate the payments to the extra works, although made generally on account, because there was no liability on the part of the guardians to pay for any of the extras.[a]

On the same principle, a surveyor who had made a plan of the parish of St. Clement's Danes, and attended as a witness in support of his plans and valuation, on the verbal orders of the guardians of the Strand Union, was held not entitled to recover any thing for his labour.[b]

To this rule there are exceptions. Corporations may make small and what are considered necessary contracts without deed. Thus a municipal corporation may hire a cook or appoint a bailiff without deed; and a trading corporation may make such contracts as are necessary to carry on their trade without deed. Within this exception the guardians of an union were held liable for a pair of iron gates for the workhouse, for which a verbal order had been given, and which had been fitted to the workhouse.[c]

By the Joint Stock Companies' Registration Act, which relates to all joint stock companies founded by deed and regis-

[a] Lamprell v. Guardians of Billericay Union, Jan. 30, 1849, 12 Law Times, 533.

[b] Paine v. Guardians of the Strand Union, 8 Q. B. 326.

[c] Sanders v. Guardians of St. Neot's Union, 8 Q. B. 810.

tered, contracts for articles, the payment or consideration for which exceeds £50, are to be in writing, and signed and authenticated in a specified manner.[a] By the Companies' Clauses Consolidation Act, which relates to most companies constituted by private Acts of Parliament, such as railway companies, &c., contracts may be made by the directors or committee so as to bind the company, either by deed or writing or word of mouth, in the same cases in which contracts by deed or writing or word of mouth are binding on individuals.[b]

If a corporation have performed its part of a contract, it does not lie in the mouth of the other party to object that the contract ought to have been, and was not, by deed.[c]

17. Some contracts are required by the statute law to be in writing. Such contracts, if not in writing, as required by the statute, are imperfect, and cannot be enforced.

The statutes which require contracts for works to be in writing are the Statute of Frauds, 29 Car. II. c. 3, and Lord Tenterden's Act, 9 Geo. IV. c. 14.

By the 4th section of the Statute of Frauds, "No action shall be brought upon any agreement that is not to be performed within a year from the making thereof, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some person by him thereunto lawfully authorized."

An agreement to hire a servant for a year, to commence on a future day, is within this statute;[d] but an agreement for a year's hiring, commencing at the time of making the agreement, which is the contract usually implied from a general hiring of a clerk or servant, is not.[e]

[a] 1 & 2 Vict. c. 110, s. 44. [b] 8 & 9 Vict. c. 16, s. 97.

[c] Mayor of Carmarthen v. Lewis, 6 C. and P. 608.

[d] Bracegirdle v. Heald, 1 B. & Ald. 722. Snelling v. Lord Huntingfield, 1 C. M. & R. 25.

[e] Beeston v. Collyer, 4 Bing. 309.

If the agreement is to be performed upon an event which may or may not happen within a year, as upon the death or marriage of one of the parties, it is not within the statute, and therefore need not be in writing.[a]

The fact of the agreement being in part performed does not take it out of the statute.[b] But according to one case,[c] which is doubted by Mr. Smith,[d] if an agreement is entirely executed on one part within a year, it is not within the statute, and the party who has fully performed his part may sue the other on the agreement, although it is not in writing. To actions upon executed considerations, that is, to actions for the price of works which have been performed, whether performed within a year or beyond, the statute does not apply, because in such case the agreement on which the action is founded is an agreement to pay the price of the work implied from its performance, and not an agreement which is not to be performed within a year.[e]

The statute requires the agreement, that is, every thing that is agreed to be done by both parties, to be in writing; and no part of the agreement can be proved by parol. If the writing contains only the agreement of one of the parties, it stands as an agreement without consideration, and is of no effect. On this ground, the case of Sykes v. Dixon,[f] already referred to, was decided. Nor can it be shown that the agreement of the parties was different in any respect than as contained in the writing. Thus where there was an agreement between a master and his clerk, that the one should serve the other at a specified annual salary, increasing each year, the clerk was not permitted to show that it was agreed that the salary should be paid quarterly, nor would the Court infer such

[a] Peter v. Compton, Skin. 353. Souch v. Strawbridge, 2 C. B. 808.
[b] Boydell v. Drummond, 11 East, 154.
[c] Donellan v. Read, 3 B. & Ad. 899.
[d] 1 Smith's Leading Cases, 144.
[e] Souch v. Strawbridge, 2 C. B. 814, per Tindal, C. J.
[f] 9 A. and E. 693, ante, p. 3.

agreement from the fact that it had been paid quarterly, the written agreement importing that it was to be paid annually.[a]

The 17th section of the Statute of Frauds provides that "no contract for the sale of any goods, wares, or merchandise, for the price of £10 sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

And by 9 Geo. IV. c. 14, s. 7, "The said enactment shall extend to all contracts for the sale of goods of the value of £10 sterling or upwards, notwithstanding they may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

If at the same time some ready-made goods are bought and others are ordered to be made, and the ready-made goods are delivered, the statutes are complied with, and the contract may be enforced.[b]

This last statute extends to all contracts for the manufacture of goods of the value of £10 or more, which, when manufactured, are to belong to the party ordering them: such are contracts for the sale of goods to be made.

But contracts for building or repairing houses, or for doing any works upon lands, if they may be performed within a year from the making thereof, need not be in writing.

18. Some contracts relating to works, if in writing, must be stamped: if unstamped, they are imperfect contracts. The Stamp Laws provide generally that no writing on which

[a] Giraud v. Richmond, 2 C. B. 835.

[b] Scott v. Eastern Counties Railway, 13 M. and W. 33.

a stamp duty is imposed shall be pleaded or given in evidence in any Court, or admitted in any Court to be good, useful, or available in law or equity, until it is marked or stamped with a lawful mark or stamp.[a]

This is a defect which may be rectified. Agreements or deeds may be stamped at any time, and if they bear a sufficient stamp when produced in evidence, no inquiry is made as to when the stamp was impressed. Agreements which do not contain more than 1080 words may be stamped within fourteen days after they are made and entered into, without payment of any penalty, and afterwards upon payment of a penalty of £10.[b] Agreements of greater length, and deeds, may be stamped after their execution, upon payment of a penalty of £5;[c] but if brought to be stamped within twelve months after their execution, the penalty may be remitted.[d]

Every agreement, or minute or memorandum of agreement, under hand, only where the matter thereof is of the value of £20 or upwards, whether it is only evidence of a contract, or obligatory upon the parties from its being a written instrument, with every schedule, receipt, or other matter put or indorsed thereon or annexed thereto, when it does not contain more than 1080 words, is subject to a stamp duty of 2*s.* 6*d.*[e] When it contains more than 1080 words, the duty is £1. 15*s.*; and for every entire quantity of 1080 words over and above the first, a further progressive duty of £1. 5*s.* But if divers letters are offered in evidence to prove an agreement between the writers, it is sufficient if any one of the letters is stamped with a duty of £1. 15*s.*, although they contain, on the whole, twice 1080 words or upwards. Memoranda or agreements for the hire of any labourer, artificer, manufacturer, or menial servant, are exempt from stamp duty.[f] Agreements relating

[a] 5 W. and M. c. 21, s. 11; 31 Geo. III. c. 25, s. 19.
[b] 7 & 8 Vict. c. 21, s. 5.
[c] 5 W. and M. c. 21, s. 11.
[d] 44 Geo. III. c. 98, s. 4.
[e] 55 Geo. III. c. 184, Sched. tit. Agreement; 7 & 8 Vict. c. 21, Sched.
[f] 55 Geo. III. c. 184, Sched. tit. Agreement.

to the sale of goods to be manufactured, which are required by Lord Tenterden's Act to be in writing, are also exempt.[a]

When the contract for works is by deed, it must be stamped as a deed not otherwise charged, the duty on which is £1. 15s., with a progressive duty of £1. 5s. for an entire quantity of 1080 words over and above the first 1080.[b]

The Stamp Law as to agreements under hand is very commonly evaded; parties, when they enter into agreements, not contemplating the event of a disagreement, and erroneously considering that there is no occasion to stamp an agreement which it may never be necessary to enforce by a resort to legal proceedings. Independently of the high moral duty of rendering unto Cæsar the things that are Cæsar's, the penalty of £5 is incurred for neglecting to stamp instruments which ought to be stamped. The consequence is, that workmen, when they go to law with their employers, are frequently placed in a difficulty in consequence of a written agreement not being stamped. The penalty to be paid upon stamping being always a burden which it is desirable to avoid, and, sometimes exceeding the amount claimed, there are frequent struggles to dispense with the production of written agreements. The rule of law on the subject is, that if from the plaintiff's evidence there appears to be an agreement in writing relating to the claim, it must be produced properly stamped: no verbal evidence can be given of its contents, or of the agreement of the parties. And even if the claim is for extra works not included in the written contract, the contract must be produced, to ascertain whether the works stated to be extras are so or not. The Judge will not look at an unstamped contract, to see whether it does or does not apply to the work claimed.[c] But if it is proved that the work sued for was done under a verbal order, distinct from the writing, the written contract need not be

[a] 9 Geo. IV. c. 14, s. 8; Defries v. Littlewood, 9 Jur. 988.
[b] 55 Geo. III. c. 184; Sched. tit. Deed.
[c] Vincent v. Cole, Moo. and Malk. 257. Jones v. Howell, 4 Dowl. 176.

produced. In the case where this was ruled, a witness proved that the plaintiffs had been employed to do the inside work of a house under a written contract (which being unstamped could not be given in evidence), and that while the work was proceeding he heard a new order given for an entablature. Lord Tenterden said that it was not imperative on the plaintiffs to produce the contract in writing, but that they might recover for the entablature without doing so.[a]

19. The consideration of illegal contracts and imperfect contracts will assist us in forming an idea of a perfect contract. A perfect contract is the agreement of two parties that something shall be done by the one for the other. There must be two parties, the party agreeing and the party agreed with; and there can be but two. However numerous the persons may be who are parties to a contract, they constitute but two parties; one set of persons is bound to do the act agreed to be done, and the other set of persons is the party for whom it is to be done, and who are entitled to exact performance. Where several persons are the party to a contract on one side, the law does not distinguish between the proportion of liability of each of them, but regards each as liable for the entire performance of the contract; and this is the reason why a man cannot contract with a partnership of which he himself is a member, and why, when an agreement is made between two partnerships, and the same person is a member of both firms, it is no legal contract: in these cases one man is a party to the contract on both sides—is agreeing with himself, and is himself bound to perform every thing that is agreed to be performed for him. On this ground many actions for services performed by individual members of joint stock companies not incorporated, for the companies, have failed. In reality, these transactions are contracts between the member of the company performing the service and the other members of the company, that they shall remunerate him in proportion

[a] Reid v. Batte, Moo. and Malk. 413.

to their interest in the company; but as a Court of Law cannot ascertain the amount of the interest of each member in the company, it cannot take cognizance of the contract, and the only remedy of the member who has performed the service is in a Court of Equity.

The subject of the contract must be some act agreed to be done. In the contracts now under consideration, the act to be done is either some work in the production of things, the subject matter of property, or some personal service. If the contract is by deed, though both parties must consent that an act shall be done, one to do the act for the other, the other to receive and permit the doing, there need be no consideration, or nothing given or done, or to be given or done, by the patient party to the contract; but if the contract is not by deed, or a simple contract, there must be a consideration, or something given or done, or to be given or done, by the patient party.

A perfect contract, when made, is in the nature of a private law, and binds the parties according to their intention in the same manner as a public law binds all persons who are subject to the legislator according to the intention of the legislator. The intention which prevails in the construction of contracts is not the private intention of the individual parties, but the intention to be collected from their expressions to each other, and which each must have understood the other to entertain. In making a contract, parties may have very dissimilar views and intentions, but they mutually profess to intend the same thing, and that which they so mutually profess is the thing. It is very improbable that a person would agree to any thing that is unjust, unequal, unreasonable, or oppressive to himself; and therefore the words of a contract are to have a just and reasonable construction, and are to be understood in that sense which will make their operation equal and fair to both parties.

Wherever the parties have not otherwise expressed themselves, they must be understood as agreeing that in any event

which may happen in the course of the performance of the contract, that which is just and fair shall be done; and in most of the cases which have arisen upon contracts, the dispute has been as to whether the parties had expressly agreed on the subject, or as to what was just and fair under the circumstances. For instance: if the agreement is that the workman shall do work skilfully, and that the employer shall pay, and the work is done unskilfully,—the employer says, "I did not agree to pay if the work was done unskilfully, and therefore you agreed to work for nothing in that event;"—the workman says, "That in the event which has happened, the agreement was that what is just should be done; and it is just that I should receive something for my work, though not done quite so skilfully as agreed;"—the law, interpreting the contract as equal to both parties, adopts the view of the workman. A contract of this nature is usually termed an implied contract, and is distinguished from the contract inferred from the ordinary meaning of the words used, which is termed an express contract. An express contract and an implied contract, however, differ but in degree, the one being expressed more clearly, and the other more obscurely, by the words used.

In treating of the contract to perform works, the method proposed is, to state the general duties of each party separately. In such a contract one party, termed the contractor, agrees to perform certain works, and the other, termed the employer, agrees to pay a certain reward. The duties of the contractor are, first, to finish the work; secondly, to use care and skill in the performance; thirdly, to do it within a proper time; fourthly, to comply with the particular stipulations in the contract as to the manner of performance. The duties of the employer are, first, to pay; secondly, not to prevent but to assist the contractor in his execution of the contract.

20. The first duty of a contractor is to complete his contract, that is, to finish all the work he has agreed to do. If he contracts to do a specific work for a specific sum, he must perform the whole of the work before he is entitled to receive

payment of any part of the price: so long as the work is unfinished, he is entitled to nothing. The plaintiff agreed to repair three chandeliers and make them complete for £10: he returned them to the defendant, having cleaned them and repaired some icicles and drops, but not in a perfect state: the jury found that the contract had not been performed, but that the defendant had derived benefit from the work to the amount of £5. The plaintiff was nonsuited, and the Court refused to set aside the nonsuit, because he had not performed his contract. It was urged that the defendant had not returned the icicles and drops which the plaintiff had added to the chandeliers; to which it was answered, that the plaintiff ought to have demanded them.[a] In an action for work done in curing a flock consisting of 497 sheep, of the scab, it was proved that the plaintiff had declared that he did not expect to be paid unless he cured them all, and that forty out of the flock were not cured. This being evidence of a contract to cure the whole for one sum, the plaintiff failed to recover.[b]

So where the contract was to build a mill for a specified sum, and if it did not answer, to build another, the Court decided that the plaintiff could recover nothing for building the mill, unless he either proved that it had answered or had been accepted by the defendant.[c]

And where the action was on a contract to build a house for a certain sum, which the plaintiff did not complete because the defendant had refused to supply him with money as he went on, Coleridge, J., ruled that he was not entitled to receive any thing under the contract until he had finished the house; and he failed to recover any thing for the work done under the contract, although he recovered for extra works.[d]

The same law prevailed in a case on a contract for building a house for a certain sum, in which it appeared that the

[a] Sinclair v. Bowles, 9 B. and C. 92.

[b] Bates v Hudson, 6 D. and R. 3.

[c] Davis v. Nichols, 2 Chit. 320.

[d] Rees v. Lines, 8 C. and P. 126.

builder had omitted to put in the house certain joists and other materials of the given description and measurement. Mansfield, C. J., nonsuited the plaintiff, being of opinion, that not having performed his agreement, he could not recover upon that, and that he could not recover the value of his work. He observed, "The defendant agrees to have a building of such and such dimensions: is he to have his ground covered with buildings which he would be glad to see removed, and is he to be forced to pay for them besides? It is said he has the benefit of the houses, and therefore the plaintiff is entitled to recover on a *quantum valebant*. To be sure it is hard that he should build houses and not be paid for them; but the difficulty is to know where to draw the line: for if the defendant is to be obliged to pay in a case where there is one deviation from his contract, he may equally be obliged to pay for any thing how far soever distant from what the contract stipulated for."[a]

In this case the work was done in a manner different from that specified in the contract, and was not left unfinished. It is an authority for the position, that a clear and positive deviation from the contract has the same effect as an omission to finish the work contracted for.

When payment is to be made by instalments, according to the quantity of work done, the workman must perform all the work agreed to be done to entitle him to an instalment before he can claim any payment: if he stops before an instalment is earned, he is entitled to nothing. An attorney covenanted with his clerk to allow him 2*s*. for every quire of paper that he should copy out;—the clerk copied four quires and three sheets. It was held by the Court of King's Bench, on error from the Common Pleas, that there could be no apportionment, for the covenant was to allow him 2*s*. for copying a quire, and not *pro ratâ;* and the judgment of the Common Pleas, which was for 8*s*. 3*d*., was reversed.[b]

[a] Ellis v. Hamlen, 3 Taunt. 52.
[b] Needler v. Guest, Aleyn, 9.

21. But if there is no contract to do a specified quantity of work for a specified sum, the workman is entitled to be paid for his work as he proceeds; at all events, if the custom of his trade authorizes such payment. A shipwright undertook to put a vessel into thorough repair: in consequence of a dispute between him and the ship-owner, he stopped work, and demanded payment for what he had done, whilst the vessel was still unfinished. He sued for and recovered the value of his work actually done to the vessel. Lord Tenterden said: "There is nothing in the present case amounting to a contract to do the whole repairs and make no demand until they are completed;" Littledale, J., and Parke, J., observing that the contract was to employ the plaintiff in the same way as shipwrights were ordinarily employed.[a]

22. If by the contract the work is to be finished before payment, the risk of all accidents which prevent the completion of the work is upon the workman. A printer was employed to print a book: when the work was nearly complete, a fire accidentally broke out on his premises, by which the whole impression was destroyed. It was proved, that by the custom of the trade a printer was not entitled to be paid for any part of his work until the whole was completed and delivered. The Court held that the custom was the law of the trade, and, so far as it extended, controlled the general law, and therefore disallowed the printer's claim.[b] In another printer's case, the plaintiffs had been employed to print 750 copies of a work: they had printed and delivered to the defendant 210 copies of the work, when a fire broke out in their premises and destroyed all the remainder. They failed to recover any thing for the printing, because the jury were not satisfied that the remaining 540 copies were all printed, completed, and ready for delivery before the fire. The defendant's counsel contended that he ought to have had notice of the

[a] Roberts v. Havelock, 3 B. and Ad. 404.
[b] Gillett v. Mawman, 1 Taunt. 137.

work having been completed, and to take it away. This does not appear to have been adverted to by the Judge in his summing up; but according to the custom, as stated in Gillett v. Mawman, was necessary.[a]

But if there is no contract or custom that the work shall be completed before payment, the workman is entitled to be paid for what he has done, in the event of the work being destroyed by accidental fire. Thus, in the case of a shipwright who was employed to repair a ship, which was burnt in the dock before the repairs were finished, and who sued for the work he had done, Lord Mansfield said, "This is a desperate case for the defendant. Though compassionate, I doubt it is very difficult for him to maintain his point. Besides, it is stated that he paid £5 for the use of the dock." Mr. Justice Wilmot: "So it is like a horse, which a farrier was curing, being burnt in the owner's own stable."[b]

23. On a contract for the manufacture of goods, the property in the thing ordered, during the progress of the manufacture and when made, is in the manufacturer, and remains in him until he has delivered it to his employer, and his employer has accepted it, or until both parties have agreed to the thing being appropriated to the employer. This is the general legal inference from the contract to make goods; but the parties may agree that the property in the thing shall pass to the employer during the progress of the work.

Until the property has passed to the employer, the manufacturer has no right to the price, although he may maintain an action against his employer for not accepting the thing made. The loss, in case of accidental destruction by fire or otherwise, is the loss of the manufacturer; and in the event of his bankruptcy, the right to the thing passes to his assignees.

Royland, a barge-builder, agreed to build a barge for Pocock. Whilst the barge was in progress, Pocock advanced

[a] Adlard v. Booth, 7 C. and P. 108.

[b] Menetone v. Athawes, 3 Bur. 1502.

him money to the whole value of the barge, and he painted Pocock's name on the stern before it was completed, and afterwards, but before the completion of the work, became bankrupt. The Court of Common Pleas held that the barge belonged to the assignees of Royland, and not to Pocock; Mansfield, C. J., saying that the only effect of the payment was, that the bankrupt was under a contract to finish the barge. Heath, J., appeared to think that the contract might have been performed by the delivery of any other barge within the proper time, and said, that the painting the name on the stern made no difference; and Lawrence, J., said, no property vests till the thing is finished and delivered.[a]

In Atkinson v. Bell,[b] the plaintiffs, as assignees of Heddon, sought to recover of the defendants the price of some patent spinning-machines which had been made by the bankrupt for them, but which they had refused to accept: they claimed the price as a debt either for goods sold or for work done. The defendants' agent had seen the machines while being made, and knew that the bankrupt intended them for the defendants. It was held that the plaintiffs could not recover the price of the machines as a debt, though they might recover damages against the defendants for their refusal to accept them. Bayley, J., said,—"When goods are ordered to be made, while they are in progress the materials belong to the maker. The property does not vest in the party who gives the order until the thing ordered is completed; and although while the goods are in progress, the maker may intend them for the party ordering, he may afterwards deliver them to another, and thereby vest the property in that other. They were Heddon's goods, although intended for the defendants, and he had written to tell them so. If they had expressed their assent, there would have been a complete appropriation vesting the property in them. Then, as to the count for work and labour, if you employ a man to build a house on your land,

[a] Mucklow v. Mangles, 318.

[b] 8 B. and C. 277.

or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labour and your materials to any other person. Having bestowed his labour at your request on your materials, he may maintain an action against you for work and labour; but if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labour and those materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and the employer accepted it, the party employed may maintain an action for goods sold and delivered; or, if the employer refuses to accept, a special action for such refusal. But he cannot maintain an action for work and labour, because his labour was bestowed on his own materials, and for himself, and not for the person who employed him."

In Laidler v. Burlinson,[a] Laidler had entered into a contract for building a ship, which specified the dimensions, &c., and the price and the plaintiff agreed to take one-fourth, the Tees Coal Company one-fourth, and other persons the remainder. Laidler commenced building the ship, and the defendant paid him the whole amount of his fourth; and Harris, a member of the Tees Coal Company, inspected the work, and occasionally found fault with it, and it was improved in consequence. Before the ship was finished, Laidler became bankrupt, and at the time of his bankruptcy the ship in question was the only one in Laidler's yard. The Court held that the contract was a contract to purchase the ship when finished, and not until then, and therefore that the property was in Laidler at the time of his bankruptcy.

24. But when, after the article is completed, each party has manifested his consent that it shall be the property of the employer, he is entitled to it. In Carruthers v. Payne,[b] the plaintiff had ordered Thompson to build a chariot for him,

[a] 2 M. and W. 602. [b] 5 Bing. 270.

which was completed according to order and paid for. After it was completed, the plaintiff ordered a front seat to be added, but the coach-builder being slow in the execution of this latter order, the plaintiff sent for it several times, and Thompson promised to send it. The plaintiff afterwards ordered it to be sold as it then was; and whilst it was in Thompson's possession for sale, he became bankrupt. The Court held that the chariot belonged to the plaintiff, and not to Thompson's assignee, and distinguished the case from Mucklow and Mangles, because both the builder and the purchaser had treated the chariot as finished.

In Elliott v. Pybus,[a] the defendant had ordered a ruling-machine of the plaintiff, without any agreement as to price, and paid money on account. When finished, the plaintiff requested him to fetch it away, and pay the balance of the price. The defendant saw it complete, admitted it was made to order, and requested the maker to send it home without payment: he first objected to the price as exorbitant, but afterwards said he would endeavour to arrange it. He was considered as having accepted the machine, and therefore to be liable for the price as a debt in an action for goods bargained and sold: both parties had agreed that the machine was the thing ordered by and made for the defendant, and that the price was proper.

In Wilkins v. Bromhead,[b] the plaintiff had ordered a greenhouse of Smith and Bryant, for £50: when finished, Smith and Bryant gave the plaintiff notice, and requested him to remit the price, which he did, and desired them to keep the greenhouse till sent for. Before the plaintiff sent for his greenhouse, Smith and Bryant became bankrupts, and their assignees claimed it. The Court held that the property had passed to the plaintiff, because there had been an appropriation on one side, and an assent to that appropriation on the other.

[a] 10 Bing. 512. [b] 6 M. and G. 963.

On these cases it will be observed, that in order to vest the property in a chattel made under a contract in the employer, there should be an agreement between the workman and employer after the chattel is made, that it is the thing made in pursuance of the contract, and as to the terms upon which it is to be delivered. The payment of the price is not essential, if the parties are agreed as to the price to be paid. In such case the thing belongs to the employer, and the workman has a lien upon it for the price. The delivery of the thing is not essential, if the parties are agreed as to the thing to be delivered.

25. But the parties may agree that the property in the chattel to be made shall be vested in the employer during the progress of the manufacture. Contracts of this nature are frequently made for building ships.

In an action of trover by the assignees of Paton, a bankrupt, it appeared that Paton, who was a ship-builder, had entered into a contract with Russell to build and complete a ship for him, and finish and launch her in April, 1819. Russell was to pay for her by four instalments of £750 each, by bills: the first, when the keel was laid; the second, when they were at the light plank; the third and fourth, when she was launched. Russell duly paid the first and second instalments, and in March, 1819, appointed a master, who superintended the building. Before the ship was finished, it was registered in Russell's name, and Paton signed the certificate of her build, for the purpose of registration: the third instalment was paid at that time. Before the ship was launched, Paton became bankrupt, and Russell took possession of her and had her launched, without paying the last instalment. The Court of King's Bench held that the property of the ship was vested in Russell. Abbott, C. J., in delivering the judgment of the Court, said, "The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship; and that as between him and the builder, he is entitled to the completion of that very ship, and

that the builder is not entitled to require him to accept any other. But this case does not depend merely upon the payment of the instalments, so that we are not called upon to decide how far that payment vests the property in the defendant, because here Paton signed the certificate to enable the defendant to have the ship registered in his (the defendant's) name, and by that act consented that the general property in the ship should be considered from that time as being in the defendant." They also held that the defendant was entitled to a rudder and cordage which had been bought by Paton specifically for the ship, though they were not actually attached to it at the time of his bankruptcy: but they decided that the assignees had a lien on the ship for the amount of the fourth instalment, for which Russell had not given bills at the time when he took possession, and were entitled to recover the amount of that instalment.[a]

In another case, the contract for building a ship provided that it should be built under the superintendence of a person appointed by the employer, and fixed the payment of the price by instalments, regulated by particular stages in the progress of the work. The Court of Queen's Bench held, that as by the contract the vessel was to be built under a superintendent appointed by the purchaser, the builder could not compel the purchaser to accept of any vessel not constructed of materials approved by the superintendent, and the purchaser could not refuse any vessel which had been so approved; and that as soon as any materials had been approved by the superintendent, and used in the work, the fabric consisting of such materials was appropriated to the purchaser. As soon as the last of the necessary materials was approved and added to the fabric, the appropriation was complete, and the general property of the vessel vested in the purchaser, because nothing remained to be done prior to the delivery. But until the last of the necessary materials was added, the vessel was not complete;

[a] Woods v. Russell, 5 B. and Ald. 942.

the thing contracted for was not in existence, for the contract was for a complete vessel, and not for parts of a vessel: but they seem to have thought that the mere fact of the ship being built with the approbation of a superintendent did not vest any property in the purchaser until it was completed. They decided, but with hesitation, upon the authority of Woods v. Russell, that the provision for payment, regulated by particular stages of the work, was made in the contract with the view to give the purchaser the security of certain portions of the work for the money he was to pay, and was equivalent to an express provision, that on payment of the first instalment the general property of so much of the vessel as was then constructed should vest in the purchaser; and that upon such payment, the rights of the parties were the same as if so much of the vessel as was then constructed had originally belonged to the purchaser, and had been delivered by him to the builder to be added to and finished, and every plank and article subsequently added became the property of the purchaser as general owner.[a]

Directly the parties have agreed that the thing in progress of making shall become the property of the employer, their agreement takes effect according to their intention; and this agreement may either be expressly made in the contract of employment, or may be inferred from the provisions of the contract, as from a provision for payment of the price of the work during its progress; or the parties may agree subsequently to the original contract, as they did in Woods v. Russell, where the signature to the certificate of registry was relied upon as evidence of an agreement by both parties that the ship then unfinished should become the property of the employer.

26. In the instance of contracts for building or repairing houses, the work is not complete, and the things made for such work do not become the property of the employer, until they are actually fixed on the land, or to the house, so as to become part of it.

[a] Clarke v. Spence, 4 Ad. and El. 448.

A builder contracted to build an hotel, and the contract provided, that in the event of his bankruptcy, his employers should take possession of *work already done* by him, and put an end to the agreement, and pay the value of the work actually done and fixed. The builder became bankrupt during the progress of the work. Before his bankruptcy, he delivered on the premises of his employers some wooden sash-frames, which he intended for the hotel: they were approved by the clerk of the works, and returned to him to have some iron pulleys belonging to his employers fixed to them; and the frames with the pulleys were in the builder's shop at the time of his bankruptcy. The sash-frames were decided to belong to the builder's assignees, and not to the proprietors of the hotel, because the contract was not to make goods as moveable chattels, but to make and fix them to the hotel.[a] It results from this case, that if a man is employed to make a window for a house, he has not finished his contract, and can claim nothing, until he has fixed the window in the house: if it is destroyed, or lost, before it is fixed, the loss is his, and he must replace it. An agreement may be so worded as to give the employer a lien on the materials before they are used in the work.[b]

27. If the work is done on a chattel delivered by the employer to the workman, the contract, generally speaking, is completed, so as to entitle the workman to be paid directly the work is finished, and the employer has had notice of that fact, and a reasonable opportunity of inspecting the work, and ascertaining that it is according to order. He is bound to deliver his work, when done, upon request and upon payment of the price, but does not forfeit his right to be paid by refusing to deliver it.

A surveyor was employed to make a map and survey of a parish, the field-books and paper being provided by the

[a] Tripp v. Armitage, 4 M. and W. 687.

[b] Hawthorn v. Newcastle upon Tyne and North Shields Railway Company, ? Q. B. 734, *n*.

employers. He finished his work, but refused to deliver the map and reference-books, except upon payment of a sum which the defendants considered excessive. They had an opportunity of inspecting the map and books. He brought an action for his demand, and the jury found that the value of his work was much less than he claimed. The Court gave judgment in his favour for the amount found by the jury. Parke, B., said, "The true state of the contract appears to me to be this: the defendants employ the plaintiff to survey a parish, and then to put down the results of his survey, first on books provided for him by the defendants, and afterwards on paper to be provided by them for him, in the shape of a map or plan; and incidental to that employment, it may be a condition that the plaintiff should give the defendants a reasonable opportunity of comparing the maps with the books, and both of them with the lands surveyed, in order to ascertain their accuracy. It is said that it is part of the same contract, that the plaintiff should be ready and willing to deliver the books and map to the defendants; but I do not think that is any part of the contract, although there may be an independent contract that the plaintiff should return the materials supplied by them, on request, as in the case of delivery of goods to a warehouseman to keep, or, which is perhaps a closer analogy, of cloth to a tailor, to be wrought into a coat; but that is altogether collateral to the right of the tailor to sue for the debt due to him: as soon as he has worked the cloth, and given his employer an opportunity of ascertaining whether it is made to fit, he has a right to send in his bill for the work."

28. Although the delivery of the thing worked on is not a condition to the right of the workman to sue for the price of his labour, he is bound to deliver it whenever his employer requests him to do so, and pays or tenders the amount due to him for his work actually done, and this although he has not finished the work contracted for, and the demand by the employer of the thing may be a breach of contract on his

part. The property in the chattel is still in the employer, notwithstanding its delivery to the workman to be wrought. He has no right to keep it until the work is completed against the owner's wish, but is sufficiently recompensed by an action against the employer for the profit he would have made, had he been permitted to complete his contract.[a]

The workman is responsible to his employer if by mistake he delivers the chattel to a wrong person. A watchmaker was employed to repair a watch; when it was repaired, he tendered it to the owner, who told him to take it to his uncle in Margaret Street, who would pay him: not finding this uncle at home, he delivered the watch to another uncle of the owner, who lost it. The watch-maker was held liable to an action for a breach of contract in not delivering the watch to the plaintiff.[b]

29. The contractor is also bound to exercise ordinary care and skill in the performance of the work, to perform it in the specified manner, and with the specified materials, if the description of materials are specified: if not, he is bound to use materials which are reasonably fit and proper for the purpose of the work.

The cases in which the degree of care and skill to be exercised in the performance of works have been discussed, are those of surgeons and other professional men; but the law established by them is applicable to every person who contracts to perform work of any description. It has been decided in the case of a surgeon, that he is bound to know and to act according to the ordinary rules and usage of his profession;[c] that he is responsible for unskilful treatment, as well as for carelessness.[d] In another case of the same description, Tindal, C. J., thus defines the degree of skill required of a surgeon: "Every person who enters into a learned profession undertakes to bring to it the exercise of a reasonable degree of care and

[a] Lilley v. Barnsley, 1 Car. and Kir. 344.

[b] Wilson v. Powis, 3 Bing. 633.

[c] Slater v. Baker, 2 Wils. 359.

[d] Seare v. Prentice, 8 East, 348.

skill. He does not undertake, if he is an attorney, that at all events you shall win your cause; nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill."[a] From these authorities may be learnt the degree of care and skill which every workman is bound to bring to the execution of his task. He must exercise that degree of care which a man of ordinary prudence would exert in the conduct of his own affairs; and he must possess and use that degree of knowledge of his art, and skill in the practice of it, which a workman of average knowledge and skill in the same trade possesses. Whether or not he has been deficient in these respects is a question of fact, to be determined, in case of dispute, by a jury. He is not, without orders, to try experiments, or to perform his work in other than the ordinary way; if he does, and damage ensues to his employer, he is answerable.[b]

30. If a chattel is delivered to the workman to be worked on, or to be used as materials for his work, he must take the same care to preserve it from injury, and to prevent its loss, as a man of ordinary prudence would take of his own property. A ship was delivered to a shipwright to be repaired, and placed by him in his dry dock. Whilst she lay there, during a remarkably high tide, the dock-gates were burst open by the water, and she was forced against another vessel and injured. The accident happened in the daytime, and all the shipwright's men were absent. In an action against him for the injury done to the ship, Lord Ellenborough held that it was the duty of the defendant to have had a sufficient number of men in the dock to take measures of precaution when the danger was approaching, and that he was clearly answerable for the effects of that deficiency.[c]

[a] Lanphiere v. Phipos, 8 C. and P. 479. [b] Slater v. Baker.
[c] Leck v. Mestaer, 1 Campb. 138.

A chronometer was delivered to a watch-maker to be cleaned and repaired. He had a servant, 18 years of age, who had been well recommended to him, and who slept in the shop at night for the purpose of protecting the property there. This servant, one night, stole the chronometer and other articles, some belonging to the watch-maker and some to his customers, which at the time of the theft were locked up in a drawer in the shop. He had an iron chest in his shop, in which watches belonging to himself, of great value, were locked up, and which was not and could not easily have been broken open. Several watch-makers proved that it was their invariable habit to lock up at night, in an iron safe, or some other place of equal security, all watches, whether belonging to themselves or in their custody for the purpose of being repaired. Dallas, C. J., was of opinion that the defendant was bound to protect the property against depredations from those who were within the house. He had taken care of his own property by locking up and securing it. The servant had been improperly trusted, and the defendant was guilty of gross negligence in leaving him in the care of the goods.[a]

31. The duty of the workman to use care and skill has reference to the contract with, and orders of, his employer. If the employer looks after his own property, and does not trust the workman with it, the workman is not bound to take care of it. So if he exercises his own judgment, and gives orders which are ignorant and unskilful, he cannot complain if the workman executes them. In a case in which a man went into a surgeon's shop and requested to be bled, saying that he had been relieved by that means before, and the surgeon's apprentice bled him,—Tindal, C. J., ruled that he could not complain of the surgeon on the ground that it was improper to bleed him, because he did not consult him as to the propriety of being bled; he took that upon himself, and only required the manual operation to be performed. He was

[a] Clarke v. Earnshaw, Gow. 30.

therefore bound to show want of skill in that.[a] The same principle was adverted to by Bayley, J., in an action for work done in erecting a stove in a shop, and laying a tube under the floor for the purpose of carrying off the smoke, which entirely failed. He said that if the employer had chosen to supersede the workman's judgment by using his own, he was bound to pay his bill.[b]

32. There is a distinction between the case of work being left unfinished, and of its being done improperly. It is not a condition to payment that the work shall be done in a proper and workmanlike manner: if it were so, a little deficiency of any sort would put an end to the contract, and deprive a workman of any claim for payment. But under such circumstances it has always been held, that where the contract has been executed, a jury may say what the workman really deserves to have.[c]

It was at one time decided, that if the work was finished, no matter how unskilfully or improperly, the workman was entitled to the contract price, and the employer's only remedy was by cross action for the negligence, on the ground that on the completion of the work the event had happened upon which payment was to be made, and that the exercise of care and skill in the performance was not a condition precedent to the agreement to pay. Thus, in an action for the price of erecting a booth on the Bath race-ground, the plaintiff proved that the measure of the booth was settled between him and the defendant, and that he was to have twenty guineas for building it, five of which had been paid, and that he did build it of the stipulated dimensions. The defendant proved that the booth fell down during the middle of the races, owing to bad materials and bad workmanship, and that the plaintiff was fully aware of both. Buller, J., held that there was no defence to the action, especially as a particular sum was speci-

[a] Hancke v. Hooper, 7 C. and P. 81.

[b] Duncan v. Blundell, 3 Stark. 6.

[c] Per Tindal, C. J., Lucas v Godwin, 3 Bing. N. C. 743.

fied; but that the defendant might bring a cross action against the plaintiff for building the booth improperly.[a]

But this rule was found to operate so unjustly,—an unskilful workman being usually a bad paymaster,—that it was soon altered; and it is now settled, that when the work is not performed in all respects according to the contract and duties of the workman, he is not entitled to recover the contract price; but that a deduction must be made from the contract price, equal to the difference between the value of the work as it would have been, had the contract been performed, and that of the work actually done.

This appears first to have been decided in the case of Basten v. Butter,[b] which was an action by a carpenter against a farmer for carpenter's work done on the farm, putting a roof on a linhay, &c. The defendant offered to prove that the work had been done in a very improper and insufficient manner, that the linhay was too weak in the roof, and after being covered with thatch, sunk in the middle, so as to let the water through, and that neither the rafters nor roof were sufficiently supported. Thompson, B., before whom the cause was tried, rejected the evidence on the authority of Broom v. Davis. The Court granted a new trial on this ground. Lord Ellenborough observed, that the action was on a *quantum meruit*, and the plaintiff ought to come into Court prepared to prove how much his work was worth, and therefore there was no injustice in suffering the defence to be entered into. Lawrence and Le Blanc, JJ., held that whether the action was on a *quantum meruit* or on a contract to pay a specific price, the plaintiff was bound to show that he had executed the work properly, and that the defendant might show that it was done improperly.

In Farnsworth v. Garrard,[c] the action was for work in rebuilding the front of a house, which, when finished, was considerably out of the perpendicular, and in great danger of

[a] Broom v. Davis, 7 East, 480, *n*. [b] 7 East, 479.
[c] 1 Campb. 38.

tumbling down, according to some witnesses, though others said it might last for years. Lord Ellenborough said—"This action is founded on a claim for meritorious service. The plaintiff is to recover what he deserves. It is therefore to be considered how much he deserves, and if he deserves any thing. If the defendant has derived no benefit from his services, he deserves nothing, and there must be a verdict against him. If the wall will not stand, and must be taken down, the defendant has derived no benefit from the plaintiff's service, but has suffered an injury. In that case, he might have given him notice to remove the materials. Retaining them, he is not likely to be in a better situation than if the plaintiff had never placed them there; but if it will cost him less to rebuild the wall than it would have done without these materials, he has some benefit, and must pay some damages."

In Duncan v. Blundell,[a] the plaintiff had erected a stove in the defendant's shop, and laid a tube under the floor for the purpose of carrying off the smoke. He sued for the price of his labour. The plan had entirely failed, and the stove could not be used. An attempt was made to show that the failure arose from some directions given by the defendant, but was not made out. Bayley, J., said—"When a person is employed in a work of skill, the employer buys both his labour and his judgment. He ought not to undertake the work if he cannot succeed, and he should know whether he will or not." The plaintiff was nonsuited.

Chapel v. Hicks[b] was an action on a special contract to erect buildings. The declaration contained a count on the contract and counts for money due for work and labour; the defendant suffered judgment by default, and proved in reduction of damages that the work and building were not equal to what the defendant had contracted for. The jury returned a verdict for the full contract price; which the Court set aside, Lord Lyndhurst saying, "If the plaintiff has not performed

[a] 3 Stark. 6. [b] 2 C. and M. 214.

the work in the manner which by the contract he agreed to do, he cannot recover on the contract, but must recover on the other counts of his declaration, for the work which he has done. Suppose, on a contract to build a house of Baltic timber, the contractor builds it of timber of a different description; upon what principle is he entitled to recover, except for the work, labour, and materials?" Bayley, B., said—"The rule is, if the contract be not faithfully performed, the plaintiff shall be entitled only to recover the value of the work and materials supplied." The observations of Lord Lyndhurst in this case were either mistaken or are misreported, since the plaintiff was entitled to recover, and did recover, on the special contract, by the admission of the defendant, who by omitting to plead, had confessed the contract, and that the plaintiff had done every thing which it was necessary for him to do to recover on it. The decision supports the opinions of Lawrence and Le Blanc in Basten v. Butter, that even when the contract is specific as to the work to be done and price to be paid, the improper performance of the work renders the workman liable to an abatement of the price, but does not entirely preclude him from recovering on the contract.

The same law is applicable to the cases of workmen whose commodity is superior knowledge or skill, such as surveyors, surgeons, &c. In an action by an engineer for his services in planning and making estimates for a bridge, the defence was, that he did not bore or examine the soil for the foundation, and in consequence the company, for building the bridge, were put to an extra expense of £1600. Abbott, C. J., said—"If a surveyor who makes an estimate sues his employers for the value of his services, it is a defence that he did not inform himself, by boring or otherwise, of the nature of the soil of his foundation, and it turned out to be bad, for this goes to his right of action."[a] On another trial on the same claim,

[a] Moneypenny v. Hartland, 1 C. and P. 352.

Best, C. J., stated the law to be, that unless the negligence and want of skill was to an extent that rendered the work useless to the defendants, they must pay him and seek their remedy in a cross action: "for if it were not so," he said, "a man might by a small error deprive himself of his whole remuneration." He further observed, "that a man should not estimate a work at a price he would not contract for it; for if he did, he deceived his employer."[a]

An auctioneer, who was employed to sell a leasehold estate, failed to recover any thing for his services because he had omitted to insert a condition in the particulars of sale, that the purchaser should not inquire into the landlord's title, and in consequence his employer was unable to make out a title to the purchaser, who refused to complete the purchase. Lord Ellenborough observed—"When the plaintiff proceeds upon a *quantum meruit*, the just value of his services may be appreciated; and if they are found to be wholly abortive, he is entitled to recover no compensation."[b]

So in an action on an apothecary's bill, a defence that his treatment was unskilful was admitted. Lord Kenyon said—"In a case where the demand is compounded of skill and things administered, if the skill, which is the principal thing, is wanting, the action fails, because the defendant has received no benefit."[c]

If at any stage of the work the negligence or want of skill of the workman renders his work useless, he is entitled to no remuneration, though he may have done much work carefully and skilfully; because in cases where he does not perform his work strictly according to contract he is to be paid only the value which his whole work is to his employer.[d]

33. Although the employer is entitled to make a deduction from the contract price where the work is not properly performed, and actually does so, he is also entitled to sue the

[a] 2 C. and P. 378. [b] Denew v. Daverell, 3 Campb. 451.

[c] Kannen v. M'Mullen, Peake, 83.

[d] Bracey v. Carter, 12 A. and E. 373. Lewis v. Samuel, 8 Q. B. 685.

workman for his breach of contract in not properly performing the work, and may recover any damage he has thereby sustained; he only abates the contract price by so much as the work done was worth less than the work agreed to be done, and does not, in all cases, deduct the whole amount of the damage he has sustained by the breach of contract.[a]

34. A manufacturer of goods is bound to manufacture them so as to answer the purpose for which they are ordered, if he is informed of the purpose for which they are wanted, and if they are capable of being so made. If, when made, the goods do not answer the purpose for which they were ordered, the employer, after giving them a reasonable trial, and finding them defective, may give notice of their insufficiency to the maker, and require him to take them away: after such notice they remain at his risk, and he cannot recover the price. But if the employer retains them beyond a reasonable time for trial without giving notice, or otherwise adopts them as his own, he is bound to pay their worth, but not the full contract price.[b] If he sustains damage by reason of the defective construction of the articles, he may maintain an action against the manufacturer.

The same law applies to a shopkeeper or dealer who undertakes to procure an article fit for a particular purpose, though he does not manufacture it. Each party undertakes that the article to be supplied shall be of a particular quality. A rope was ordered of a shopkeeper who dealt in ropes. He was told that it was wanted for the purpose of raising pipes of wine from a cellar. He took the order and procured a rope to be made, which his servants fixed to his customer's crane. The rope was not sufficiently strong, and broke whilst being used in raising a pipe of wine, which of course was spilled. The purchaser brought an action for its value. It was con-

[a] Mondel v. Steel, 8 M. and W. 858. Rigge v. Burbidge, 15 M. and W. 300.

[b] Okell v. Smith, 1 Stark. 107. Per Lord Tenterden, Street v. Blay, 2 B. & Ad. 463.

tended on the part of the seller of the rope, that it was a case of a sale of goods, and that as he did not warrant the rope, the maxim of *caveat emptor* applied. Tindal, C. J., thus distinguished the case from that of an ordinary sale of goods. "If a party purchases an article on his own judgment, he cannot afterwards hold the vendor responsible on the ground that the article turns out unfit for the purpose for which it was required; but if he relies on the judgment of the seller, and informs him of the use to which the article is to be applied, the transaction carries with it an implied warranty that the thing shall be fit and proper for the purpose for which it was required." [a]

The same law has been extended to the case of a manufacturer who makes articles for sale, though he does not make them to order, and sells them after they are made. He is understood as warranting them fit for the purpose for which they are sold, and for which they are apparently adapted, and for which he represents to the buyer they were manufactured. A man buying of a manufacturer relies on the manufacturer's judgment, honesty, care, and skill, rather than on his own judgment. Copper sheathing was sold by a manufacturer of that article for sheathing a ship: it wore away at the end of four months instead of lasting four years, which was the average duration of such a commodity; and although no fraud was imputed to the manufacturer, he was held liable for the injury sustained by the ship-owner by reason of the defective condition of the copper. [b] A barge-builder, who had sold a new barge built by himself, and which was so defectively constructed that it was not reasonably fit for use as an ordinary barge, was, on the same principle, held liable for damages to the purchaser. [c] In these cases the purchasers brought actions for the breach of the implied warranty: they might have resisted actions for the price, had the things been wholly useless, or have abated

[a] Brown v. Edgington, 2 M. & G. 279.

[b] Jones v. Bright, 5 Bing. 533.

[c] Shepherd v. Pybus, 3 M. & G. 868.

the contract price if they were of some use; but inasmuch as the things sold and delivered were the identical things which they ordered and bought, they could not have returned them, or have refused to receive them. Thus, where a steam engine was sold to some millers, whose foreman inspected it before they bought it, and which was described as an engine of 14-horse power, but when set up proved to be only a 9-horse engine, it was held that the millers had no right to reject it, although they were entitled to an abatement of the price, and to sue for the breach of warranty.[a]

The case is very different if an article of a particular description is ordered to be made or bought, which the buyer believes will answer a particular purpose, but which is wholly ineffectual to produce the end proposed. In such case the buyer exercises his own judgment as to the utility of the article, and the seller is not responsible for its failure, if he supplies the article ordered without an express warranty. He agrees to make or sell, not an article fit for a particular purpose, but a particular article. This law is applicable to many cases of orders and sales of patented things. The plaintiff ordered a machine, called Chanter's Smoke-Consuming Furnace, for his brewery. It was of no use to him, and he objected to pay for it, but was obliged.[b]

35. The contractor is also bound to finish his work within the limited time, if any time is expressly limited by the contract. If the contract does not specify the time within which it is to be performed, it must be done within a reasonable time; that is, such time as under all the circumstances of the case is reasonable, or within which men of ordinary diligence, with proper assistance, would complete the work.[c]

Where a time is limited, it is sometimes a condition to the contractor's right to remuneration that the work be completed

[a] Parsons v. Sexton, 2 C. B. 899.
[b] Chanter v. Hopkins, 4 M. & W. 399. Ollivant v. Bagley, 5 Q. B. 288.
[c] See Ellis v. Thompson, 3 M. and W. 445.

within the limited time. It is such condition where it is so expressly provided, or where the non-performance within the limited time goes to the whole consideration, and deprives the employer of all benefit from the contract. This is the case where goods are sold, or ordered to be made, and to be delivered within a limited time: until the delivery of the goods, the purchaser derives no benefit from the contract; and therefore, if they are not delivered within the limited time, or within a reasonable time, he may repudiate the contract, and refuse to receive them.[a] The case is different with respect to building works, every portion of which is beneficial to the employer. The employer, therefore, is not justified in refusing payment of the price of the work because the whole work was not completed within the limited time. Lucas agreed to do the bricklayers', plasterers', and slaters work to certain cottages, for £216, which Godwin agreed to pay, on condition of the work being done in a proper and workmanlike manner, on the 1st January, 1837, and the work was to be completed on the 10th October, 1836. The Court held that the completion of the work on the 10th October was not a condition precedent to Lucas's right to payment, because it did not go to the essence of the contract, or to the whole of the consideration. "It never could have been the understanding of the parties," said the Chief Justice (Tindal), "that if the house were not done by the precise day, the plaintiff should have no remuneration: at all events, if so unreasonable an engagement had been entered into, the parties should have expressed their meaning with a precision which could not be mistaken." Coltman, J., appears to have thought that the plaintiff, not having strictly performed his contract, was not necessarily entitled to the contract price, but that a deduction might be allowed, if the work was less valuable to the defendant by reason of the delay.[b]

[a] Ellis v. Thompson, 3 M. and W. 445. Alexander v. Gardner, 1 Bing. N. C. 671. Kingdom v. Cox, 5 C. B. 522. [b] Lucas v. Godwin, 3 Bing. N. C. 737.

But in Littler v. Holland,[a] where the plaintiffs had by deed covenanted to build two houses for the defendant on or before the 1st April, 1788, and in consideration thereof, the defendant covenanted to pay £500, and it appeared that the plaintiffs did not complete the houses by the 1st April, but that the defendant agreed verbally to enlarge the time, and the work was finished within the enlarged time, the plaintiffs were nonsuited, the Court evidently considering that it was a condition precedent to payment, that the work should be done within the time; and giving judgment on the ground that the performance of the covenant could not be dispensed with by a parol agreement. This case is hardly consistent with that of Lucas v. Godwin and the cases already referred to, which establish that the proper performance of the work is not a condition to the workman's right to payment. His want of diligence is merely an impropriety in the execution of the work; and a failure in this respect is sufficiently compensated by a cross action when the contract is by deed; or by cross action or deduction, or both, in the case of a simple contract.

But when a sum of money is agreed to be paid expressly as a reward for diligence, then performance within the time is of course a condition precedent. As where the defendant agreed to purchase a house for a certain sum, and also agreed to pay £80 additional, provided the adjoining houses should be completed, *i. e.* roofed, sashed, and paved in front, by the 21st April, 1829, and it appeared that the pavement in front of the houses was not laid down before the 28th April, the delay being occasioned by the badness of the weather, which prevented the men from working, the plaintiff failed to recover any part of the £80.[b]

If the contract provides for a penalty, or liquidated damage, to be paid for delay beyond the specified time, the completion within the time is not a condition to payment, because the parties have expressly provided for the consequences of delay.

[a] 3 D. and E. 590. [b] Maryon v. Carter, 4 C. and P. 295.

Thus in Lamprell v. the Guardians of Billericay Union,[a] the plaintiff covenanted completely to finish the building before the 24th June,—and the deed contained a provision, that if he should fail in the completion of all the works within the time specified, unless hindered by fire or other cause, satisfactory to the architects, he should pay the defendants £10 per week so long as the works should remain incomplete,—the time was held not to be essential, because of the weekly sum to be paid for the delay.

If a day is limited for the completion of the contract, the contractor has until the last moment of the day to finish his work; if he has done by twelve at night, he has performed his contract.[b]

If the contract is to be performed within so many months, they are understood, in the absence of any usage of trade to the contrary, to mean lunar months of four weeks each.[c] If the time is limited from the time of making the contract, or from the time of any other act or event, the day of making the contract, or on which the act or event happens, is to be excluded in reckoning the time: thus if a man on the 1st of January contracts to build a house within six months from the time of making the contract, he is bound to have built the house, at the latest, on the 18th of June.[d]

36. If the contract provides, as it frequently does, for the payment of a stipulated sum by the contractor for delay, the sum so payable is a debt from the contractor to the employer; and if the contract provides that the sum shall be deducted from the contract price, and the employer pays the contract price without deduction, he may set off the penalty for delay against the price of extra work, or against any other claim which the contractor may have against him.[e]

If the contract provides for the work being done before a certain day, and for a penalty being paid for delay, and the

[a] 12 Law Times, 533. [b] Startup v. Macdonald, 6 M. and G. 593. [c] Lang v. Gale, 1 Maule and Sel. 111. [d] Lester v. Garland. 15 Ves. 248. [e] Duckworth v. Alison, 1 M. and W. 412.

contractor is delayed by his employer in the commencement of the work or during its progress, he is not responsible for not completing the work within the time, or for the penalty: the act of his employer excuses him from the performance of his contract.[a]

But a breach of contract by the employer, which does not necessarily operate to prevent the completion of the work within the time limited, and which may be sufficiently compensated in damages, does not excuse the contractor from the performance within the time, or from payment of the stipulated penalty for delay. The plaintiff covenanted with the Midland Counties Railway Company, that in consideration of £15,000, in addition to £258,629. 10*s*. 6*d*., he, being provided by the company with railway bars, or rails and chairs, for temporary or permanent use, would complete a certain portion of the railway and the line of permanent railway on or before the 1st of June, 1840; and that if he should not complete the said railway by the 1st of June, 1840, he would pay to the defendants £300 for the 1st of June, and the like sum for every succeeding day, until the whole of the work should have been completed. He sued the company for the £15,000, and they claimed to deduct £7500 for penalties for delay. It appeared that the railway was not finished until twenty-four days after the 1st of June, but that the company did not supply the plaintiff with bars, rails, and chairs in sufficient quantity to enable him to complete the work by the 1st of June. The Court held that the covenant by the company to supply rails, and of the plaintiff to complete by the 1st of June, were independent covenants, and that the plaintiff was not excused from the penalties by the omission of the company to supply rails, because any other construction would lead to the conclusion, which they thought an unreasonable one, that the non-supply of a single rail or chair by the time specified for its delivery, although in the result wholly immaterial to the facilities for completion, would entitle the plaintiff to receive

[a] Holme v. Guppy, 3 M. and W. 387.

the £15,000 given for expedition money, without his giving the expedition for it.[a]

If the contractor is longer than the time limited about the work, in consequence of additional work being ordered to be done by the employer, he is not excused from the payment of the penalties for delay, if the deed allows additional time for the additional work. The plaintiff agreed to build a barn, waggon-shed, and granary, according to a specified plan, and the defendant was at liberty to order additional work. The specified work was to be finished on the 23rd of October; if not, the plaintiff was to pay £1 for every day that might be used beyond; but if the defendant required additional work, the plaintiff was to be allowed such extra time beyond the 23rd of October as might be necessary for doing and completing the same. The Court held that the circumstance of the defendant ordering additional work did not exempt the plaintiff altogether from the penalty, but that he was *primâ facie* liable to the £1 per day for every day consumed after the 23rd of October, but was to be allowed out of those days so many days as were necessarily employed in doing the additional work.[b]

37. If the contract provides that the contractor shall obtain the certificate of the employer's architect before payment, he must do so. That he shall obtain such certificate is a condition precedent to his right to payment. A builder agreed to erect certain buildings under the superintendence of A. B. Clayton, or other the architect of his employer for the time being; and the contract, after providing for payment of portions of the price during the progress of the work, stipulated that the balance found due to the builder should be paid by the employer within two calendar months after receiving the said architect's certificate that the whole of the buildings and work thereby contracted for had been executed and completed to his satisfaction. It appeared that Mr. Clayton had examined and

[a] Macintosh v. Midland Counties Railway Company, 14 M. and W. 548.
[b] Legge v. Hurloch, 13 Jur. 229.

approved of the builder's charges, and had written to the employer to that effect, but had not given a certificate that he was satisfied with the manner in which the work had been done. This was held to be a condition precedent to the builder's right to recover for the work, and to apply to extra and additional works, as well as those specified in the contract.[a]

In Lamprell v. the Guardians of the Billericay Union,[b] the contract provided that the builder should be paid 75 per cent. on the amount of the work from time to time actually done, to be ascertained and settled by the architects of the guardians, and the remaining 25 per cent., and the amount estimated by the architects as the value of the additional work, if any, within thirty days from the full completion of the contract; and that the builder should not be entitled to receive any payment until the works, on which such payments were made to depend, should have been completed to the satisfaction of the architects, who should examine and make a valuation of the amount so completed from time to time, and certify the same to the guardians, after which the builder should be entitled to receive the amount of payment, at the rate aforesaid, which should be then due in respect of work so certified to be completed. The Court intimated their opinion that a certificate by the architects was only necessary to enable the builder to draw 75 per cent. on account, and was not required on the completion of the contract.

In another case, in which there was an agreement between a landlord and tenant that the tenant should expend £200 in altering and repairing the house demised, and that the alterations should be inspected and approved of by the landlord, and be done in a substantial manner, and that the £200 should be allowed out of the rent,—it was held that the approval by the landlord was not a condition precedent to the allowance of the £200; that the substance of the agreement

[a] Morgan v. Birnie, 9 Bing. 672. [b] 12 Law Times, 533.

was that the works should be properly done, and that if they were properly done, the condition was substantially complied with; that it never could have been intended that the landlord should be at liberty capriciously to withhold his approval; and if such was the intention, the condition would go to the destruction of the thing granted, and be void. The Court observed, that in Morgan v. Birnie, the architect was appointed as an arbitrator between the parties.[a]

In another case, in which a charter-party provided that no allowance for short tonnage or deficiency in loading the ship should be made, unless the same should be certified by the defendants' presidents, agents, or chiefs and councils, or supercargoes, from whence she should receive her last dispatch,—it appeared that the plaintiff had taken all proper steps to obtain the necessary certificates, but that by the acts and defaults of the defendants' agents, it became impossible for him to obtain them. The Court held that the endeavour to obtain the certificate, so frustrated, was equivalent to performance of the condition.[b]

38. The great duty of the employer is to pay. *Sine pecuniâ nil,* although not mentioned by Mr. Broom, is one of the most important maxims of the law, which, like the philosopher's stone, turns, or attempts to turn, every thing it touches into gold. A blow on the head, a breach of the seventh commandment, or of a lover's vow, are severally transmuted in the legal crucible into so many pounds, so many shillings, and so many pence.

The General Rule is, that when a man bestows his labour for another, he has a right of action to recover a compensation for that labour.[c] If he is employed without any thing being said as to payment, the presumption is, that he is to be paid the value of his services according to the usual rate of remuneration.

[a] Dallman v. King, 4 Bing. N. C. 105.

[b] Hotham v. the East India Company, 1 D. and E. 638.

[c] Per Cur., Poucher v. Norman, 3 B. and C. 745.

In the case of salvage services performed in rescuing a ship from wreck, the salvor is entitled to remuneration from the necessity of the case, although he does not work upon the retainer of the ship-owners.[a] But in other cases of services voluntarily performed in taking care of a lost thing and searching for the owner, it is doubtful whether the finder has any right to remuneration for his services. It is clear that he has no lien upon the thing found.[b]

39. If the service performed is an act of friendship or kindness, no remuneration can be claimed. If a person takes a journey to become bail for another, he cannot maintain an action against such person for his trouble or loss of time in such journey, because he does not undertake the journey as work or labour, or as a person employed by the defendant, but he does it as his friend, and to do him a kindness.[c]

A step-father brought an action against his step-daughter for her board, maintenance, and education. Lawrence, J., directed the jury to consider "whether the plaintiff, at the time he began to provide for her, expected to be paid at a future time; or whether he was not acting as every moral man who married a woman having children by her former husband would act; namely, taking care of those whose interests would be most dear to the woman he had chosen for his wife. A man who married a woman with children, whether he had fortune or no fortune with her, was not bound to provide for her children. As a moral man it might be expected from him, but the law would not enforce it. That which was at first intended for a gratuity could not be afterwards converted into a debt." The jury found for the defendant.[d] In a similar case, it appeared that the step-child had some property, and that the step-father maintained and

[a] Newman v. Walters, 1 B. and P. 612.

[b] Binstead v. Buck, 2 W. Bl. 1117. Nicholson v. Chapman, 2 H. Bl. 254.

[c] Reason v. Wirdnam, 1 C. and P. 434.

[d] Pelly v. Rawlins, Peake, Ad. Cases, 226.

educated him in a manner superior to what he would reasonably have done had he been a member of his own family; and the step-son, when he came of age, promised to pay him for his board and education. The step-father recovered; the Court considering that he had given the son an education proportionable to his future prospects, but beyond his own means, upon the expectation that the son would take it into his consideration after he came of age.[a]

If services are rendered in expectation of a legacy, and not upon an understanding that they are to be paid for, there is no obligation to pay. The plaintiff brought an action for his services in transacting Mr. Guy's stock affairs. It appeared that he was no broker, but a friend; and it looked strongly as if he did not expect to be paid, but to be considered in the will. Lord Chief Justice Raymond directed the jury, that if that was the case, they could not find for the plaintiff, though nothing was given him by the will; for they should consider how it was understood by the parties at the time of doing the business; and a man who expects to be made amends by a legacy cannot afterwards resort to his action.[b] This direction was approved of in the case of an apothecary who had attended a deceased lady for eleven years, without ever sending in his bill. Tindal, C. J., there told the jury, that if the plaintiff had attended the deceased on an understanding that he was to be paid only by a legacy, he was not entitled to recover. They found for the plaintiff. The Court refused to disturb the verdict, upon the ground that it was not proved that there was any understanding that the plaintiff was not to be paid for his services, except by a legacy; and that in the absence of such evidence, it must be presumed that the understanding was, that he should be remunerated in the usual way.[c]

The services of barristers and physicians are by the custom

[a] Cooper v. Martin, 4 East, 76.

[b] Osborn v. the Governors of Guy's Hospital, 2 Str. 728.

[c] Baxter v. Gray, 3 M. and G. 771.

of their professions honorary, and their fees are received as gratuities; they therefore cannot maintain actions for them,[a] unless there is an express contract to pay them, in which case a barrister or physician may sue.[b]

40. If it is expressly agreed that it shall be left to the employer whether any thing and how much shall be paid for the services performed, it is optional with the employer to pay,—as where a person was employed by a committee of management for the sale of lottery tickets, under a resolution that any service to be rendered by him should, after the third lottery, be taken into consideration, and such remuneration be made as should be deemed right, it was held that no action could be maintained.[c] But if only the amount of payment is left to the employer, he is bound to award some amount; and if he fails to do so, a jury may award to the workman such a sum as the employer, acting *bonâ fide,* would and ought to have awarded. The plaintiff entered into the defendant's service upon the terms contained in a letter written by the plaintiff, in which he said,—"The amount of payment I am to receive, I leave entirely to you." Having served him for six weeks, he was held entitled to recover the value of his services, though the defendant had awarded him nothing.[d] If the amount of remuneration is to be fixed by a third person, no action can be maintained if he has not fixed the amount.[e]

Where a surgeon delivered a bill with a blank for his attendance, Lord Kenyon considered that he left the amount of his remuneration to the generosity of his patient, and could not recover more than he was willing to give him.[f] And an attorney, after delivering his bill, cannot increase the amount

[a] Chorley v. Bolcot, 4 D. and E. 317. Veitch v. Russell, 3 Q. B. 928.

[b] Egan v. the Guardians of the Kensington Union, 3 Q. B. 935, *n.*

[c] Taylor v. Brewer, 1 Maule and Sel. 290.

[d] Bryant v. Flight, 5 M. and W. 114.

[e] Owen v. Bowen, 4 C. and P. 93.

[f] Tuson v. Batting, 3 Esp. 192.

of his charges, though he may recover for items which have been omitted by mistake.[a]

If a workman is employed without any thing being said as to payment, the understanding is that the employer will pay him any amount he pleases to charge, not exceeding the reasonable value of his labour: and if, after the work is done, he shows his intention of charging nothing, by delivering a bill in blank, or charges less than the value of his labour, he has, in the one case, precluded himself from recovering any thing; in the other, from recovering more than he has charged. But if, at the commencement of the employment, he agrees to leave to his employer the amount of his remuneration, the understanding of the parties is that the employer will award a fair and reasonable sum for the work done. If the work is valuable, and he awards nothing, or less than the value of the work, he is guilty of a breach of his engagement, and the workman becomes entitled to recover the value of his labour by way of damages. This distinction is warranted by the cases of Bryant v. Flight, and Tuson v. Batting.

41. If the engagement of the employer, in Bryant v. Flight, had been—"I will pay the amount your services are worth, if I choose,"—the condition, leaving it optional with the employer to pay or not to pay, would have been repugnant and inconsistent with his engagement to pay; and as the engagement and its condition could not stand together, the condition would have been rejected, according to the principle by which agreements are construed against the party professing to bind himself, and in favour of the other party. This is the law adverted to by Tindal, C. J., in Dallman v. King, and was the ground of the decision in Furnivall v. Coombes.[b] In that case the plaintiff had agreed by deed, with the churchwardens and overseers of the parish of St. Botolph, Aldgate, to repair Aldgate church for a certain sum of money, which they covenanted to pay, but annexed to their covenant a proviso, that nothing in the

[a] Loveridge v. Botham, 1 B. and P. 49.

[b] 5 M. and G. 736.

deed should extend, or be construed to extend, to any personal covenant of, or obligation upon, the churchwardens and overseers, or anywise personally affect them, their executors, administrators, goods, estates, and effects, in their private capacity; but should be, and was intended to be, binding and obligatory upon the churchwardens and overseers for the time being, and their successors, as such churchwardens and overseers, but not further or otherwise. The Court held that, inasmuch as churchwardens and overseers could not bind their successors, the proviso that they should not be personally bound to pay was repugnant to the covenant, and void.

42. It has already been mentioned, in considering the duty of the workman to perform his work with skill and care, that although the work is not properly performed, the workman is entitled to be paid for its value. In cases also in which conditions precedent to payment have not been observed, as if it is not finished, or not finished in time, where to finish the work, or to finish it in time, is a condition precedent to payment, the employer is bound to pay the value of the work if he accept the work, or encourages the workman to proceed, or acquiesces in his proceeding, after the contract has been broken by him. A landlord agreed with his tenant to pay him for building a tap-room, provided it was built according to a plan to be agreed upon, and completed within two months. No plan was agreed upon, but the tenant built a tap-room. He did not complete it within two months. After the two months had elapsed, the landlord said that the chamber over the tap-room would be a useful room, and inquired when it would be finished. He also said, that if the tenant did not finish it soon, he, the landlord, would finish it; that the expense would be nothing to the tenant, as it would all fall upon him, the landlord. The Court gave judgment in favour of the tenant. They said,—"It is a settled rule, even in the case of a deed, that if there be a condition precedent, and it is not performed, and the parties proceed with the performance of other parts of the contract,

although the deed cannot take effect, the law will raise an implied assumpsit. Here, although the plaintiff cannot put his case upon the written agreement, he may go upon the agreement raised on so many of the facts of the case as are applicable. In Ellis v. Hamlen[a] there was no acquiescence by the defendant. Here is an acquiescence: for, first, the defendant uses all this building; secondly, he sees it go on, and never objects; thirdly, he sees a delay, and says, Why does not the plaintiff go on, the expense is nothing to him; the expense will be mine? And he says, respecting the room above, that it will be very convenient."[b]

43. And if the contract is to do several things for a single sum, the employer cannot resist payment because all the things contracted to be done have not been performed. The plaintiff covenanted to teach the defendant the art of bleaching materials for making paper, and to permit him, during the continuance of a patent, which the plaintiff then had, to bleach such materials according to the specification in the patent. The defendant, in consideration thereof, paid the plaintiff £250, and covenanted to pay him £250 more. In an action for the £250, it was held not necessary for the plaintiff to show that he had taught the defendant the art of bleaching, because it did not go to the whole consideration. The plaintiff was entitled to an action against the defendant for the non-payment of the £250, and the defendant to another against the plaintiff for not teaching him.[c] But in such case, if the contract is a simple contract, and not a covenant, the defendant may give the plaintiff's breach of contract in evidence in mitigation of damages. The plaintiff, in consideration of £220. 10*s.* to be paid by the defendant, agreed to sell, and plant on the defendant's land, a quantity of trees, and to keep them in

[a] Ante, p. 35.

[b] Burn v. Miller, 4 Taunt. 745. Davis v. Nicholls, 2 Chit. 320. Lucas v. Godwin, 3 Bing. N. C. 744.

[c] Campbell v. Jones, 6 D. and E. 570. Stavers v. Curling, 3 Bing. N. C. 355. Mills v. Blackall, 12 Jur. 93.

order for two years after the planting. The Court held that the defendant might show, in reduction of damages, that trees of an inferior quality to those agreed for were planted, and that they were not kept in order.[a]

44. In cases in which work has been done in a manner different from that specified in the contract, the employer is not bound to pay the contract price, nor the value of the work done. He is bound to pay the contract price, less the amount it will take to alter the work, so as to make it correspond with the specification.[b] This should be understood as applying to a case in which the employer either has, or intends to have, the work altered, and made to correspond to the original contract. If he has accepted the inferior work, and does not intend to have it altered, then it seems reasonable that the workman should recover the value of the inferior work, taking the contract price as the criterion of the value of the works specified; that is, that he should have so much less than the contract price as the inferior is less valuable than the works contracted to be performed. For instance: if a builder has contracted to build a house with the best bricks at the price of inferior bricks, and he uses inferior bricks, and his employer accepts and uses the house, he ought not to recover the contract price, because he has not performed his contract; nor ought he to recover the value of the bricks used, because that might be as much, or more, than the contract price, and he must suffer for breaking his contract; nor ought the employer to be allowed for pulling down and rebuilding the house with the best bricks, because he does not intend to do so, but is content to accept the house built with inferior bricks. But the difference in value between the bricks agreed to be used and those actually used, should be deducted from the contract price; and by this means the builder will lose just so much as he expected to gain by his roguery.

45. In cases in which there are contracts to do works for

[a] Allen v. Cameron, 1 C. and M. 832.

[b] Thornton v. Place, 2 Moo. and Rob. 218.

certain sums, the employers are frequently called upon to pay more than the sums specified, in consequence of the contract having been departed from, or for works extra the contracts. The rule in cases of deviations from contracts has been thus stated by Lord Kenyon: "Where additions are made to a building which the workman contracts to finish for a certain sum, the contract shall exist as far as it can be traced to have been followed, and the excess only paid for according to the usual rate of charging. I admit, that if a man contracts to work by a certain plan, and that plan is so entirely abandoned that it is impossible to trace the contract and say to what part of it the work shall be applied, in such case the workman shall be permitted to charge for the whole work by measure and value, as if no contract at all had ever been made.[a]

If a workman is employed under a contract for a certain sum, and the work is done, with the consent of his employer, in some manner different from the manner specified in the contract, he is not entitled to more than the contract price, unless the deviations are of such a nature that the employer must have known that they would increase the expense, or unless the workman informed his employer, before departing from the contract, that such would be the consequence of the departure. In an action on a carpenter's bill, in which the work was done in altering a house which was originally undertaken on a contract for a fixed sum, but alterations were subsequently made in the original plan, and the plaintiff claimed to abandon the contract, and recover a measure and value price for all the work done,—Lord Tenterden observed—"A person intending to make alterations of this nature generally consults the person whom he intends to employ, and ascertains from him the expense of the undertaking; and it will very frequently depend on this estimate whether he proceeds or not. It is therefore a great hardship upon him if he is to lose the protection of this estimate, unless he fully understands that such conse-

[a] Pepper v. Burland, Peake, 139.

quences will follow, and assents to them. In many cases he will be completely ignorant whether the particular alterations suggested will produce any increase of labour and expenditure; and I do not think that the mere fact of assenting to them ought to deprive him of the protection of his contract. Sometimes, indeed, the nature of the alterations will be such, that he cannot fail to be aware that they must increase the expense, and cannot therefore suppose that they are to be done for the contract price. But where the departures from the original scheme are not of that character, I think a jury will do wisely in considering that a party does not abandon the security of his contract by consenting that such alterations shall be made, unless he is also informed, at the time of the consent, that the effect of the alteration will be to increase the expense of the work."[a]

To entitle a workman, therefore, to claim extra payment for deviations from the contract, it should appear, first, that the deviation has occasioned extra expense, either in materials or labour; secondly, that the employer was aware that extra expense would be occasioned when he consented to the deviation, either from the nature of the deviation, or by the information of the workman; thirdly, it seems to follow, that the workman is only entitled to recover the value of the extra labour and materials so rendered necessary.

When extra works have been done in addition to the contract, the workman is entitled to be paid for such works, although he has not performed his contract,[b] and although the time for the payment of the contract price has not arrived.[c]

46. The consideration of the duty of the employer to pay involves that of the right of the workman to receive payment, and leads to that of his remedies to enforce it. He may not only maintain an action at law, but in the case of a chattel delivered to him to be worked upon, he has a lien upon

[a] Lovelock v. King, 1 Moo. and Rob. 60.

[b] Rees v. Lines, 8 C. and P. 126.

[c] Robson v. Godfrey, 1 Stark. 275. Holt, N. P. C. 236.

or right to detain the chattel until the amount due for his work bestowed upon it is paid. This right of lien, generally speaking, exists wherever a moveable thing has been delivered to a workman to be improved or altered, and he has improved or altered it by bestowing his labour upon it. Thus a shipwright has a lien on a ship delivered to him to be repaired;[a] and a farmer has a lien on a mare delivered to him to be covered by a stallion.[b] But there is no lien when the thing is not altered, nor its value improved by the labour of the workman bestowed upon it;[c] or when no labour is bestowed upon and mixed up with the thing itself.[d] Nor is there any lien when its existence is inconsistent with the agreement of the parties; as if credit is agreed to be given for payment of the price of the labour; or if the understanding is that the employer is to have and use the thing occasionally whilst the work is going on, as in the case of a livery-stable keeper, or an agister of cows. In the one case the owner of the horse is entitled to have and use it whenever he wishes, in the other the owner of the cows is entitled to milk them, which rights are considered to be inconsistent with a right of lien.[e]

A right of lien is lost by the workman relinquishing the possession of the thing. If, therefore, he delivers the thing to the owner, or pledges it, his lien is gone.[f] It is lost if he refuses to deliver it upon tender of the amount due;[g] or if he claims a right to detain for any cause other than his lien;[h] but he does not lose his lien merely by demanding more for his work than he is entitled to.[i]

47. It is also the duty of the employer not to do any act which will prevent the workman from performing his contract,

[a] Exp. Ockendon, 1 Atk. 235. [b] Scarfe v. Morgan, 4 M. and W. 270. [c] Stone v. Lingwood, 1 Str. 651.
[d] Steadman v. Hockley, 15 M. and W. 553. [e] Jackson v. Cummins, 5 M. and W. 350. [f] Scott v. Newington, 1 Moo. and Rob. 252. [g] Jones v. Tarleton, 9 M. and W. 675.
[h] Boardman v. Sill, 1 Campb. 410. [i] Scarfe v. Morgan, 4 M. and W. 270.

and also to do every act necessary to be done by him, to enable the workman to perform his contract. If, by the employer doing or omitting to do any act, the workman is prevented from performing his contract, he is excused from the performance, and is, so far as he has been disabled by the employer, entitled to recover from the employer any damage he may have sustained by the act or omission of the employer.

A publication was commenced by some booksellers, called 'The Juvenile Library,' and they employed an author to write a volume for it, on Costume and Ancient Armour, for £100. When he had written a considerable part of the work, they abandoned the publication. He refused to allow them to publish his work separately, and commenced an action, and recovered £50, although he had not finished or tendered his work, they having exonerated him from so doing by abandoning the publication.[a] A tenant covenanted to expend £100 in substantial repairs and improvements to a dwelling-house, under the direction and with the approbation of some competent surveyor, to be named by the landlord. The landlord failed to recover against the tenant for not expending the money upon the premises, because he had not named a surveyor.[b] In the case already mentioned, in which the calico-printer demanded from the engraver rollers sent to be engraved, before the work was finished, Rolfe, B., expressed his opinion that the engraver, who was bound to deliver the rollers when demanded, would have a right of action for being prevented from completing the work.[c]

So in the case of Hotham v. East India Company;[d] the plaintiff having been prevented from obtaining the certificates by the act and default of the agents of the Company, was in the same situation as if he had obtained them. And in Dallman v. King,[e] it was the duty of the landlord to approve of the repairs, if substantially done; and therefore, by im-

[a] Planché v. Colburn, 8 Bing. 14. [b] Coombe v. Green, 11 M. and W. 480. [c] Lilley v. Barnsley, 1 C. and K. 344, ante, p. 46.
[d] 1 D. and E. 638, ante, p. 63. [e] 4 Bing. N. C. 105, ante, p. 63.

properly withholding his approbation, he could not defeat the tenant's right to the allowance. And in Bryant v. Flight,[a] it was the duty of the defendant to award to the plaintiff a reasonable remuneration for his services, and his not doing so did not prevent the plaintiff recovering. And in Holme v. Guppy,[b] the defendant not having given the plaintiff possession of the ground for three weeks after the date of the contract, and he being delayed for a week by the default of the masons employed by the defendant, excused him from finishing his work within the time specified, and from payment of the penalties provided for delay.

48. The contract between master and servant is, that the servant shall serve the master in a particular capacity, for a definite or indefinite time, in consideration of wages to be paid by the master; and that the master shall pay wages, in consideration of the service to be rendered by the servant. The general duties of the servant upon this contract are to serve, and serve properly: the general duties of the master are to employ, and pay wages.

First, it is the duty of the servant to serve for the time prescribed by the contract. To ascertain the extent of this duty, the duration of the period must be determined. The general understanding of parties is, that a general hiring of a servant, without any circumstance to show that a less time was meant, is a hiring for a year.[c] The reason given is, that both master and servant may have the benefit of all the seasons.[d] This rule applies to the cases of all servants who are hired in a permanent capacity for an indefinite time, such as servants in husbandry, domestic servants, trade servants, reporters to newspapers, &c.[e]

49. The hiring of a domestic or menial servant, though for

[a] 5 M. and W. 114, ante, p. 66. [b] 3 M. and W. 387, ante, p. 60.
[c] Rex v. Seaton v. Beer, Cald. 440. Rex v. Macclesfield, 3 D. and E. 76. Rex v. Worfield, 5 D. and R. 506. [d] Per Best, C. J., Beeston v. Collyer, 2 C. and P. 609. [e] See Holcroft v. Barber, 1 C. and K. 4. Baxter v. Nurse, 1 C. and K. 10.

a year, is subject to be determined at any time by a month's warning on the part of the master or the servant, or by payment of a month's wages by the master in lieu of warning.[a] This custom applies, although the contract between the master and servant is in writing, if the written agreement does not negative or is not inconsistent with it.[b]

A head gardener, who had the management of a gentleman's hot-houses and pineries, at the wages of £100 a year, with a house within the master's grounds, and the privilege of taking two apprentices, and who had five under-gardeners employed for his assistance, was held to be a menial servant within the custom, whom his master was entitled to dismiss upon a month's notice. Lord Abinger said, "I should have been inclined to have told the jury that the plaintiff was a menial servant; for though he did not live in the defendant's house, or within the curtilage, he lived in the grounds within the domain."[c]

50. A trade servant, or a servant in husbandry,[d] or other servant not menial, who is engaged for a year, cannot be dismissed until the end of the year. If the contract is not determined at the end of the first year, but the relation is continued, a new contract is understood to be made to serve for another year, on the same terms as those of the preceding year's service, and so from year to year, until either party puts an end to the relation at the end of some year. But neither party can lawfully determine the relation of master and servant during the currency of any year.

The plaintiff had been for many years in the service of the defendant as his clerk, in his business of army agent, at a salary of £500 a year, which was at first paid quarterly, but afterwards monthly. His service commenced on the 1st March, 1811, and he was discharged on the 23rd December,

[a] Archard v. Hornor, 3 C. and P. 349. Robinson v. Hindman, 3 Esp. 235. [b] Johnson v. Blenkinsop, 5 Jur. 870. [c] Nowlan v. Ablett, 2 C. M. and R. 54. [d] Lilley v. Elwin, 12 Jur. 623.

1826. He recovered £83 damages for this discharge. On an application to set aside the verdict, on the ground that there was no evidence of a yearly hiring, Best, C. J., observed, "It would be indeed extraordinary, if a party in the plaintiff's station of life could be turned off at a moment's notice, like a cook or scullion. If a master hire a servant without mention of time, that is a general hiring for a year; and if the parties go on four, five, or six years, a jury are warranted in presuming a contract for a year in the first instance, and so on for each succeeding year, as long as it pleases the parties. It is not necessary for us now to decide whether six months, three months, or any notice, be requisite to put an end to such a contract; because, under the circumstances of the present case, after the parties had consented to remain in the relation of employer and servant, from 1811 to 1826, we must imply an engagement to serve by the year, unless reasons are given for putting an end to the contract."[a]

In an action by a reporter for the 'Morning Post' newspaper, on a contract to employ him for a year, it was held to be no plea that the defendant tendered the plaintiff a reasonable sum above his wages in lieu of notice, and on his refusal to accept it, gave him notice of his intention to put an end to the service a reasonable time before his dismissal, because it did not appear that the notice expired with the year, and by the terms of the contract the service could only be determined with the year.[b]

The cases do not establish that in the case of a contract to serve and employ from year to year, any notice is necessary to determine the relation of master and servant at the end of a year. If any such notice is necessary, it must be so either by the express agreement of the parties, or by the general understanding and practice of masters and servants in similar cases. There is no reason for any such notice, since each party knows

[a] Beeston v. Collyer, 4 Bing. 309. Huttman v. Boulnois, 2 Car. and Payne, 510. [b] Williams v. Byrne, 7 A. and E. 177.

that the contract of service will expire, if not renewed, at the end of each year.

51. The circumstance of the wages being payable weekly or monthly is a circumstance to show that the hiring and service is to be for a week, and from week to week, or for a month, and from month to month, and not for a year. Thus, where a pauper had hired himself as a plumber and glazier, for board, lodging, and wages of six shillings per week, he was held to be a weekly, and not a yearly servant.[a] In another case, as to the settlement of a pauper who had been hired as an ostler, at four shillings per week, in which it was decided that he was a weekly servant, Buller, J., thus stated the law: "If there be any thing in the contract to show that the hiring was intended to be for a year, the reservation of weekly wages will not control the hiring. But if the reservation of weekly wages be the only circumstance from which the duration of the contract is to be collected, it must be taken to be only a weekly hiring."[b] A similar decision was come to in a case where the servant was to have four shillings a week, except in the harvest time, when his wages were to be increased to ten shillings and sixpence a week, and afterwards to be reduced to four shillings. The provision for an increase of wages at harvest time did not make him an annual servant.[c] And in another, where the agreement was that the servant should have eight shillings per week, and two guineas for the harvest.[d]

But if the parties show an intention to bind themselves to serve and employ for a longer period than a week, the reservation of weekly wages does not control the time of service, and the period for service is a year. Thus, where a farm servant was hired at three shillings a week the year round,

[a] Rex v. Dedham, Bur. S. C. 653. [b] Rex v. Newton Toney, 2 D. and E. 453. Rex v. Odiham, 2 D. and E. 622. [c] Rex v. Droitwich, 3 Maule and Sel. 243. [d] Rex v. St. Mary, Lambeth, 4 Maule and Sel. 315.

with liberty to go on a fortnight's notice, the Court held it to be an express contract to serve the year round, with power for either party to determine it by a fortnight's notice.[a] A miller hired a servant at three shillings and ninepence per week, with liberty of parting on a month's notice on either side. This was held to be an annual hiring, determinable by a month's notice, the provision for the month's notice showing that the parties intended to bind themselves to serve and employ for more than a week.[b]

In an action by a warehouseman against his employer, the agreement was — "William Cash engages to pay Thomas Fawcett £12. 10s. per month for the first year, and advance £10 per annum until the salary is £180, from the 5th March, 1832." This was held to be a contract for a year, because by agreeing to pay £12. 10s. per month for *the first year*, the parties contemplated that the service was to continue for one year at all events, and that it might continue for four, in which case there was to be a yearly advance of salary.[c]

52. The nature of the service is also an important circumstance to be taken into consideration, in order to ascertain whether the understanding of the parties was that the employment should be for a year. In a case in which it appeared that the plaintiff had been employed to write articles for a new monthly publication,—he had written an article each month, and been paid £10 per month,—the jury found that he was not employed for a year, notwithstanding it was proved that the usual engagement of editors, sub-editors, and reporters to newspapers, was annual.[d] In another case, the plaintiff had been engaged as editor of a new review, at three guineas a week, with a progressive increase of salary according to the sale of the review. The custom, that the engagement of

[a] Rex v. Birdbrook, 4 D. and E. 245. [b] Rex v. Hempreston, 5 D. and E. 205. Rex v. Great Yarmouth, 5 Maule and Sel. 114. Rex v. St. Andrew in Pershore, 8 B. and C. 679. [c] Fawcett v. Cash. 5 B and Ad. 904. [d] Holcroft v. Barber, 1 C. and K. 4.

editors, &c. to newspapers was for a year, unless otherwise expressed, was proved. The jury found that the contract was not for a year's service, but for a week, and so on from week to week. The Court refused to disturb the verdict, on the ground that it was not an inflexible rule that contracts for services, without any definite arrangement as to time, were contracts for a year, but a presumption to be raised from contracts of the same kind; and that the circumstance that the publication was new, was material to be taken into consideration.[a] In these two cases, the plaintiffs, having been employed to serve the defendants as editors of new publications, which might not answer, their services might not be required for a year.

The presumption that the hiring was general for a year cannot be made in a case in which there is no evidence of the hiring, and in which occasional payments have been made by the master, but not at any fixed and definite periods. In such case the occasional payments warrant the inference of a hiring at will, and the servant may recover the value of his services, although he has not served a year.[b]

Nor does the presumption apply when the duration of the service is expressed to be at the will of either of the parties. Where a boy entered into the service of a farmer, for meat and clothes, as long as he had a mind to stop, he was held to be a servant at will, and not for a year.[c]

53. A man may contract to serve for his life, but the contract in such case should be by deed.[d]

54. If the hiring is at so much for the service, or so much for a year, or other period of time, the servant must perform the whole service, or serve for the whole period, before he is entitled to any wages; and if, from any cause, he does not

[a] 1 C. and K. 10; 6 M. and G. 935. [b] Bayley v. Rimmell, 1 M. and W. 506. [c] Rex v. Christ's Parish, York, 3 B. and C. 459. Rex v. Great Bowden, 7 B. and C. 249. [d] Wallis v. Day, 2 M. and W. 273.

perform the whole service, or serve the whole time, he is entitled to no part of the wages, because the contract is to pay a certain sum for a certain service, and not to pay that sum, or a portion of it, for part of the service.

Throgmorton was appointed by the Earl of Plymouth, by writing, to receive his rents, and the Earl agreed to pay him £100 per annum for his service. Throgmorton died, three-quarters of a year after his appointment, and his executrix brought an action for £75. Judgment was given against her, because, without a full year's service, nothing could be due, and the year's service was in the nature of a condition precedent. There was no difference between wages and rent, or an annuity; and it being one consideration and one debt, could not be divided.[a]

Cutter v. Powell[b] was an action by the administrator of a sailor, who had died during a voyage from Jamaica to Liverpool, for his services as second mate, from the time of entering the ship until the day of his death. The terms of his engagement were contained in the following note, signed by the defendant: "Ten days after the ship 'Governor Parry,' myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of 30 guineas, provided he proceeds, continues, and does his duty as second mate in the said ship from hence to the port of Liverpool. Kingston, July 31st, 1793." The Court held that the plaintiff was not entitled to recover any thing, because the defendant only engaged to pay the intestate on condition of his doing his duty on board during the whole voyage; and he was to be entitled either to thirty guineas or to nothing; for such was the contract between the parties.

If the servant is dismissed for misconduct before any wages have become payable by the terms of the contract, he is entitled to nothing. In an action for wages by a yearly

[a] Countess of Plymouth v. Throgmorton, 1 Salk. 65.

[b] 6 D. and E. 320; 2 Smith, Leading Cases, 1.

servant of a farmer who had been dismissed during the year for misconduct, Lord Ellenborough observed,—"If the contract be for a year's service, the year must be completed before the servant is entitled to be paid." The servant abandoned his action, by withdrawing a juror.[a] In another action, by the foreman of silk manufacturers, who was to have wages at the rate of £80 per year, for his services from January to June, when he was dismissed for misconduct,—the Court held that the plaintiff was not entitled to recover any thing; Parke, J., observing, that the *primâ facie* presumption was, that the plaintiff was hired for a year, and there was nothing to rebut that presumption; and having violated his duty before the year expired, so as to prevent the defendants from having his services for the whole year, he could not recover wages *pro ratâ*.[b]

The same law was acted upon in Ridgway v. the Hungerford Market Company,[c] in which the plaintiff had been appointed clerk to the company, at a salary of £200 a year, which was payable quarterly, and had been dismissed for misconduct during a quarter. Lord Denman then said, that if a party hired for a certain time so conduct himself that he cannot give the consideration for his salary, he shall forfeit the current salary, even for the time for which he has served. The other Judges said, that in such case he shall not recover his salary. The latter expression is the more correct, as by reason of the dismissal before the salary becomes due, the event has never happened on which it was to become due, namely, service for the whole of the period agreed.

In Lilley v. Elwin,[d] the plaintiff was a farm labourer, hired generally at £10. 10s. for the year, and was discharged for misconduct at the end of ten months,—the Court decided that he was entitled to no wages, saying, "If the plaintiff had been guilty of disobedience of orders, and unlawfully absenting

[a] Spain v. Arnott, 2 Stark. 256. [b] Turner v. Robinson, 5 B. and Ad. 789. [c] 5 Ad. and El. 171. [d] 12 Jur. 623.

himself from his work, so as to justify his discharge, and the defendant had discharged him, the plaintiff was entitled to nothing; the contract being £10. 10*s*. for the year, and no part of the wages being due till the end of the year.—If, on the other hand, the discharge was not justifiable, the plaintiff was at liberty to treat that discharge as a rescinding of the contract by the defendant, and sue for his wages *pro ratâ* up to the time of the unjustifiable discharge."

According to Hulle v. Heightman,[a] even where the servant is improperly discharged by the master before any wages have become due, he is not entitled to recover wages as wages, because the whole of the stipulated service has not been performed; but his remedy is for damages, for the master's breach of contract for preventing him from serving. This decision is disapproved by Mr. Smith,[b] on the ground that the act of the master operates as a rescission of the contract by him, which act the servant may adopt, and sue the master for the value of his services on a contract inferred from the fact of the master having accepted the services actually rendered. This view appears to have been adopted by the Court in Lilley v. Elwin.

55. When the wages are *at the rate of* so much per year, and not so much per year, they are divisible; and if the servant is discharged without notice during the year, he may sue for his wages up to the time of his dismissal as a debt, and can only recover them in that shape.[c] And perhaps in such case he is entitled to wages up to the time of his dismissal, if he is dismissed for misconduct. The case of Turner v. Robinson, already cited, is to the contrary. There the Court appear to have considered that no wages were due until the end of the year, although they were made payable *at the rate of* £80 per year.

56. It is also the duty of the servant to serve properly. He

[a] 2 East, 145. [b] 2 Leading Cases, 11.
[c] Hartley v. Harman, 11 A. and E. 798.

must obey the just and reasonable commands of his master. He should be careful and faithful to his master's interests and property committed to his charge, and behave with decency, and consistent with his character as servant. If he is guilty of wilful disobedience of the master's lawful command, or habitual neglect of the duties of his service, or conducts himself with dishonesty towards his master, or with gross indecency in the master's house and in relation to his service, or acts in a manner inconsistent with his station of servant, he violates an essential condition of the contract, and may be dismissed. But a disobedience not wilful and contumacious, or a neglect which is not seriously injurious to the master's interests, do not justify the master in dismissing the servant.

57. The wilful disobedience of a just and reasonable command of the master, which the servant on entering into the service has contracted to obey, is a breach of duty which authorizes the master to put an end to the contract of service, and to dismiss the servant.

The command must be just and reasonable, and have reference to the service which the servant has contracted to perform. The servant is not bound to risk his safety in the service of the master, but may, if he think fit, decline any service in which he reasonably apprehends injury to himself.[a]

A master told his servant to go with the horses to the marsh, which was a mile off, before dinner. It was the servant's usual dinner-hour, and dinner was then ready. The servant said that he had done his due, and would not go till he had had his dinner. The master told him to go about his business. He went accordingly, and brought an action for his wages. Lord Ellenborough said,—"If the plaintiff persisted in refusing to obey his master's orders, I think he was warranted in turning him away. There is no contract between the parties except that which the law makes for them; and it may be hard upon the servant, but it would be exceedingly

[a] Per Lord Abinger, Priestley v. Fowler, 3 M. and W. 6.

inconvenient if the servant were permitted to set himself up to control his master in his domestic regulations. After a refusal, on the part of the servant, to perform his work, the master is not bound to keep him on as a burthensome and useless servant to the end of the year."[a]

A carpenter was employed to repair a gentleman's house in the country. He sent his servants down to do the work. In consequence of a complaint from the gamekeepers, the men were directed not to go into the preserves. One of them afterwards went into the preserves, and was dismissed. Coleridge, J., left it to the jury to say, whether the workman did not go down to Staunton (the name of the seat) on the understanding and undertaking that he was to conduct himself decorously and properly,—and whether the master was not justified in dismissing him. He observed, that if the master employed men who acted so as to disoblige his customers, by going into their gardens and preserves, when they were told not, he would soon find that he was injured in his business, and would lose his custom, because gentlemen would not employ him. The jury found that the master was justified in dismissing the workman.[b]

In an action for dismissing a domestic servant, the defendant pleaded that the plaintiff asked for leave of absence, which he refused; but she nevertheless left his service, and remained absent all night, and until the following morning, wherefore he discharged her. She replied, that she requested leave of absence because her mother had been seized with sudden sickness, and was in imminent danger of death; and because the defendant wrongfully and unjustly refused his permission, she went without, and did not cause any hindrance to him in his domestic affairs, and was not guilty of any improper omission or unreasonable delay in her duties. The Court gave judgment against the plaintiff, on the ground

[a] Spain v. Arnott, 2 Stark. 256.
[b] Read v. Dunsmore, 9 C. and P. 588.

that her replication did not allege that she gave notice to the defendant of her mother's illness. Pollock, C. B., remarked,—"It is very questionable whether any service to be rendered to any other person than the master would suffice as an excuse; she might go, but it would be at the peril of being told that she could not return." Parke, B., said,—"*Primâ facie* the master is to regulate the time when his servant is to go out from and return to his home. Even if the replication had stated that he had had notice of the cause of her request to absent herself, I do not think it would have been sufficient to justify her in disobedience to his order." Alderson, B., said,—"There may, undoubtedly, be cases justifying a wilful disobedience of an order of the master; as, when the servant apprehends danger to her life or violence to her person from the master, or when, from an infectious disorder raging in the house, she must go out for the preservation of her life."[a]

A man was engaged by a farmer as a waggoner, but during harvest he worked in the field generally. The practice was, during harvest, to work until eight in the evening. The waggoner refused to work till that hour, because, he said, that strong beer of good quality was not allowed him, according to a pretended custom, and the beer supplied being, as he alleged, very bad small beer, and not so good as water. There was no such custom as to beer, and his master discharged him for this refusal to work. The Court of Queen's Bench held that he was justified in so doing.[b]

In an action by a courier for his wages, it appeared that his mistress had dismissed him before his year's service was up, because, in getting into her carriage at Padua, she had desired him not to stop at a particular hotel, where she had been before, but at another; but he, notwithstanding, did stop at the forbidden hotel, and, when remonstrated with, said he had

[a] Turner v. Mason, 14 M. and W. 112.
[b] Lilley v. Elwin, 12 Jur. 623.

not been told; and at the second hotel was sulky, and neglected to come on two or three occasions when rung for, and was insolent in manner at Florence. Parke, J., told the jury that there was a contract for a year, with an implied agreement that if there was any moral misconduct, either pecuniary or otherwise, wilful disobedience, or habitual neglect, the defendant should be at liberty to part with the plaintiff; and that, in his opinion, no such conduct had been proved. The jury found for the plaintiff.[a]

58. In an action by a servant for a month's wages, on the ground of his having been discharged without warning, it was proved that he had been negligent in his conduct, frequently absent when his master wanted him, and often slept out at nights. Lord Kenyon ruled that the plaintiff was not entitled to recover, on account of his misconduct.[b]

A surgeon attempted to justify the dismissal of his pupil and assistant, with whom a premium had been paid, from his service, because he had occasionally come to his house intoxicated, and at such late hours, that he could not compound the medicines, on which occasions he had ordered the shop-boy to compound them. Lord Denman said,—that the assistant coming home intoxicated was not of itself a sufficient cause for dismissing him, but that his employing the shop-boy to compound the medicines, if thereby real danger was occasioned to the master's business, was. He considered the case as intermediate between that of an apprentice who cannot be dismissed for misconduct, and that of a servant who can.[c] A teacher of French and drawing in a school did not return to the school for a long and unreasonable time after the holidays had expired, but it did not appear that the master was obliged to hire another, or that the teacher's department was not adequately filled, or that the master was delayed or

[a] Callo v. Brouncker, 4 C. and P. 518.

[b] Robinson v. Hindman, 3 Esp. 231.

[c] Wise v. Wilson, 1 C. and K. 662. See also Lacy v. Osbaldiston, 8 C. and P. 80.

injured in the matter in which he would have employed the teacher during the time of his absence. The neglect was held not sufficient to entitle the master to dissolve the contract and dismiss the teacher, though it might be a breach of contract by the teacher, and support an action against him at the master's suit.[a]

The neglect to justify a dismissal must be such as to cause an injury to the master, and as demonstrates that it will be injurious to the master to continue the servant in his employ. And so a disobedience, not wilful and contumacious, which will justify a dismissal, must be such as to occasion an injury and loss to the master.[b]

59. If the servant is absent during the period of service in consequence of sickness, it is not a neglect or breach of duty. The master is bound to provide and take care of him during his sickness, and cannot dismiss him, or even deduct his wages for the time during which he is sick.[c] It is doubtful whether the insanity of the servant authorizes the master to put an end to the contract, and dismiss the servant.[d]

If the servant, towards the expiration of his period of service, absents himself without the leave, or even in disobedience of the master, for the purpose of seeking another engagement at a usual time, it is not a breach of his contract. A farm servant, hired for a year, three days before his year's service was up, asked leave of his master to go to a statute fair, to be hired for the next year. The master refused leave, but the servant went. The Court held that the master was not justified in dismissing him for this cause. "Consider," said they, "how the case stands with regard to the servant. He

[a] Filleul v. Armstrong, 7 A. and E. 557.

[b] Cussons v. Skinner, 11 M. and W. 161.

[c] Rex v. Islip, 1 Str. 423. Rex. v. Christchurch, Bur. S. C. 494. Rex v. Sharrington, 2 Bott. 322. Rex v. Maddington, Bur. S. C. 675. Chandler v. Grieves, 2 H. Bl. 606, *n*. Rex v. Sudbrook, 1 Smith 59, per Le Blanc, J.

[d] Rex v. Sutton, 5 D. and E. 659. Rex v. Hulcot, 6 D. and E. 587.

knew his master designed to part with him at the year's end, and therefore it was high time for him to look out for another place. To this end, he applied in a very proper manner for leave to go to the statute fair, which was a place where, in all likelihood, he might have provided himself, and not be obliged to lie idle all the year, it being usual for people in the country to go thither to hire their servants. The master, like an unreasonable man, refused so reasonable a request. As therefore the request was reasonable, and upon a just ground on the side of the servant, and the refusal unreasonable on the side of the master, we think the servant's going afterwards, without leave, is no forfeiture of his former service."[a]

60. Any act of dishonesty by the servant during the service, to the injury of the master's property or business, is a breach of duty which will justify his dismissal, as well as render him liable to an action. An accountant employed by a joint stock company, at an annual salary, entered in their books, under the orders of the managing director and the secretary, a sum of £1080 as paid for salt, which to his knowledge had been spent in the purchase of shares. It was held that the company were justified in dismissing him as an improper person to fill the situation of their accountant.[b] A manufacturer was held justified in dismissing his foreman because he had advised his apprentice to abscond from his service, and assisted him to go to America. The manufacturer also recovered damages in an action against the foreman.[c]

But a traveller who solicits his master's customers to deal with him when his service is at an end is not guilty of a breach of his relative duty. In an action against the defendant, who had been the plaintiffs' traveller, for seducing their customers, Lord Kenyon observed,—"The conduct of the defendant in this case may perhaps be accounted not

[a] Rex v. Islip, 1 Str. 423. Rex v. Polesworth, 2 B. and Ald. 483.

[b] Baillie v. Kell, 4 Bing. N. C. 638.

[c] Turner v. Robinson, 6 C. and P. 15; 5 B. and Ad. 789.

handsome, but I cannot say that it is contrary to law. The relation in which he stood to the plaintiffs, as their servant, imposed on him a duty which is called of imperfect obligation, but not such as can enable the plaintiffs to maintain an action. A servant, while engaged in the service of his master, has no right to do any act which may injure his trade or undermine his business; but every one has a right, if he can, to better his situation in the world; and if he does it by means not contrary to law, though the master may be eventually injured, it is *damnum absque injuriâ.* There is nothing morally bad, or very improper, for a servant who has it in contemplation, at a future period, to set up for himself, to endeavour to conciliate the regard of his master's customers, and to recommend himself to them, so as to procure some business from them as well as others. In the present case, the defendant did not solicit the present orders of the customers; on the contrary, he took for the plaintiffs all those he could obtain: his request of business for himself was prospective, and for a time when the relation of master and servant between him and the plaintiffs would be at an end."[a]

61. The understanding of the parties on a contract between master and servant is, that the servant shall conduct himself with morality and decency while in the master's service; and if he is guilty of any breach of duty in this respect, the master may dismiss him. A female servant, hired for a year, was dismissed because she was with child. Lord Mansfield said, "I think the master did not do wrong. Shall he be bound to keep her in his house? To do so would be *contra bonos mores*, and in a family where there are young persons, both scandalous and dangerous."[b] So a master was held to be entitled to discharge a man who had got his female servant with child.[c] A clerk and traveller, who had been hired for a year, and lived and boarded in the master's house, made an assault upon his

[a] Nichol v. Martyn, 2 Esp. 732.
[b] Rex v. Brampton, Cald. 11.
[c] Rex v. Welford, Cald. 57.

female servant, with intent to ravish her, for which he was dismissed; and it was held rightly.[a]

But the fact of the servant having been the father of a bastard child before the master hired him, or being guilty of a crime of that description out of his master's house, does not justify his dismissal. It is not seducing the master's servant, or turning his home into a brothel.[b]

62. An act of a servant, inconsistent with his character of servant, is a breach of his duty which justifies the master in dismissing him. The Directors of the Hungerford Market Company resolved to dismiss their clerk, which resolution he, according to the duties of his office, entered in a book, and under it subjoined a protest by himself against the proceeding, and they at once dismissed him. Lord Denman desired the jury to say whether the entry of the protest by the clerk justified his dismissal without notice. They found that it did.[c] A wine-merchant dismissed his clerk because he claimed to be a partner. He was held justified; because, having disclaimed being a servant, if the master had suffered him to go on in his employment, the nature of his situation might have been doubtful, and evidence that he really was a partner.[d]

63. When a master dismisses his servant for misconduct, he need not at the time of his dismissal state the cause; and if he assigns an insufficient cause for the dismissal, and a sufficient one exists, he may justify the dismissal on the ground which existed, though he cannot do so on the cause assigned.[e] But if he dismisses for an insufficient reason, and the servant has been guilty of misconduct, which is then unknown to the master, he cannot justify the dismissal for the cause

[a] Aikin v. Acton, 4 C. and P. 208.

[b] Per Lord Mansfield, in Rex v. Westmeon, Cald. 129.

[c] Ridgway v. The Hungerford Market Company, 3 Ad. and El. 171.

[d] Amor v. Fearon, 9 Ad. and El. 518.

[e] Ridgway v. The Hungerford Market Company, 3 Ad. and El. 171. Baillie v. Kell, 4 Bing. N. C. 638.

not known at the time.[a] It must appear, not only that there was a cause of dismissal, but also that the master dismissed for that cause, although it need not appear that he told his servant why he dismissed him. If, after knowledge of the servant's misconduct, the master continues him in his service, and accepts his services, it may amount to a condonation of the misconduct,[b] and the master cannot, on any subsequent cause of displeasure, dismiss the servant for the previous misconduct.

64. If the wages are payable *pro ratâ,* and not lost by reason of the misconduct,—or if the servant is not dismissed, the misconduct may be taken into consideration in estimating the value of the servant's services, and he is not entitled to his full wages, as he would have been had he served faithfully and properly.[c]

65. A contract between a master and servant, by which the servant agrees to serve for a certain time,—a year, for instance,—and the master agrees to pay wages, or salary, for the year's service, creates the relation of master and servant for the prescribed period; and the master is bound to continue that relation for the whole time. He is not bound to provide the servant with any particular work, or to keep him continually at work; but he is bound to retain him in his service; and if he dismisses him, and puts an end to the relation of master and servant before the expiration of the year, he is guilty of a breach of contract, and answerable to the servant in an action for damages. This has recently been decided, by the Court of Exchequer Chamber reversing the judgment of the Court of Common Pleas. The action was on an agreement between an attorney and a company, by which it was agreed that the plaintiff, as attorney and solicitor of the company, should receive and accept a salary of £100 a year, in lieu of rendering an annual bill of costs for general business transacted by the plaintiff for the company as such attorney

[a] Cussons v. Skinner, 11 M. and W. 161. [b] Per Ld. Denman, 3 Ad. and El. 174. [c] Baillie v. Kell, 4 Bing. N. C. 638.

and solicitor; and that he should, and would, for such salary, advise and act for the company on all occasions, in all matters connected with the company, with certain exceptions, and should attend the secretary of the company, as well as the board of directors and the meetings of proprietors, when required. He complained that the company did not retain or employ him as their attorney, but dismissed him from being their attorney before the expiration of a year from his appointment. The Court of Common Pleas gave judgment against the plaintiff, on the ground that there was no agreement by the company to retain and employ, but merely to pay him his salary. The Court of Exchequer Chamber held, that the agreement being to give a certain salary for one year, at least, to the plaintiff, who engaged for it to give his services, if required, created the relation of attorney and client, and amounted to a promise to continue that relation, at least for a year, but that the company were not bound to furnish him with business, as an attorney and solicitor, at all events, or to require his advice, or use his services, as an attorney, whenever they had occasion to require the service of an attorney. "Medical advisers may be employed, at a salary, to be ready in case of illness;—members of theatrical establishments, in case their labours should be needed;—household servants, in performance of their duties when their masters wish: in these, and other similar cases, the requirement of actual service is distinct from the employment by the party employing. If it is held that such a contract as this was for service and pay respectively, and that although the employer determines the relation by an illegal dismissal, yet the employed may entitle himself for the whole time by being ready to serve,—that doctrine, if sanctioned, will be of pernicious consequence in case of a business being discontinued or a dismissal for misconduct without legal proof. According to the plaintiff's construction, the agreement creates the relation of employer and employed; and the illegal determination of the relation entitles him to indemnity, the measure of damage

being the actual loss, which may be much less than the wages, when another employment may be easily obtained. According to the defendant's construction, it is a contract for service and pay; and the whole salary, for all the time comprised in the contract, becomes due, if the plaintiff served, or was ready to serve."[a]

If an agreement between master and servant provides that the master shall be at liberty to dismiss the servant on giving him a month's notice, or paying him a month's wages, it implies an obligation by the servant to serve, and the master to employ, until the agreement is put an end to by the notice or payment of wages. In an action for harbouring the servant of a glass-maker, it appeared that there was an agreement between the glass-maker and his workman, that the workman should serve the glass-maker for seven years, and should not, during the term, work for any other person; that during any depression of the trade he should be paid a moiety of his wages; that if he should be sick or lame, the master should be at liberty to employ any other person in his stead without paying him any wages; that the master should pay him, so long as he continued to be employed, wages by the piece, and £8 per annum in lieu of house-rent and firing, and should have the option of dismissing him from his service upon giving him a month's wages or a month's notice. It was objected that this agreement was void for want of mutuality, and as an unreasonable restraint of trade, there being no obligation on the master to employ; but the Court held that an obligation by the master to employ was necessarily to be inferred from the option to dismiss, and that the obligation to serve, and the restraint on the workman against working for any others, were co-extensive with the obligation to employ.[b]

In another action for seducing the servant of a glass and alkali manufacturer, the agreement between the master and servant was, that the servant should for seven years serve the plaintiff

[a] Elderton v. Emmens, 4 C. B. 479; 11 Law Times, 311.
[b] Pilkington v. Scott, 15 M. & W. 657.

or his partner or partners, or such of them as should carry on the trade or business then carried on by him as a glass and alkali manufacturer, and that the servant should not, during the term, work for any other person; that the plaintiff should, so long as the servant continued to be employed for him or his partners, pay him twenty-four shillings per week for 1200 tables; and the plaintiff agreed to find the workman some other description of work, provided he did not require 1200 tables, so that his wages should not be less than twenty-four shillings per week, except when a furnace should be out, when the servant engaged to work for twenty-one shillings per week. In case the servant should be sick, or lame, or otherwise incapacitated to perform, or should not perform the work and service aforesaid and his engagement with the plaintiff, or in case he should not in his opinion have conducted himself properly, or as he ought to do, or if the plaintiff or his partners should discontinue the trade or business during the term of seven years, they should be at liberty to retain any other person in lieu of the servant, and should not be obliged to make any payment. Upon an objection taken to this agreement, it was held to impose on the master an obligation to employ for seven years, provided the trade was carried on so long, and on the servant to serve during the same period; and that he was only restrained from working for others so long as the master was bound to employ and he was bound to serve.[a]

But if the master merely engages to pay wages to the servant in proportion to the work to be done by him, he does not bind himself to find him work. An agreement was made between the owners of a colliery and some colliers, that the colliers should for a year do such work as might be necessary for carrying on the colliery, and as they should be required to do by the owners; that the owners should pay them wages in proportion to the work done; that during all the times the mines should be laid open, the parties hired should continue

[a] Hartley v. Cummings, 5 C. B. 247.

the servants of the owners, and when required, except when prevented by sickness, they should perform a full day's work on each and every working day. It was held that the owners were not bound to employ the colliers at work at reasonable times for a reasonable number of working days during the term: it was quite optional with them to set the labourers to work.[a]

In Aspdin v. Austin,[b] the plaintiff agreed to manufacture cement for the defendant; the defendant, on condition of the plaintiff performing his agreement, agreed to pay him £4 weekly during two years following the date of the agreement, and £5 weekly during the next year, and also to receive him into partnership at the expiration of three years. It was held by the Court of Queen's Bench, that this agreement did not bind the defendant to employ the plaintiff in manufacturing cement, but merely to pay wages in case the plaintiff did manufacture the cement, or was ready and willing to do so, and was prevented by the defendant. They said, "Where parties have expressly covenanted to perform certain acts, they cannot be held to have impliedly covenanted for every act convenient or even necessary for the perfect performance of their express covenants. Where parties have entered into written engagements with express stipulations, it is not desirable to extend them by any implication: the presumption is, that having expressed some, they have expressed all the conditions by which they intend to be bound under the instrument. It is assumed that the defendant, at however great a loss to himself, was bound to continue his business for three years; but the defendant has not covenanted to do so; he has covenanted only to pay weekly sums to the defendant on condition of his performing what on his part is a condition precedent."

And on the same principle they held, in Dunn v. Sayles,[c] that the defendant was not liable for refusing to allow the

[a] Williamson v. Taylor, 5 Q. B. 175. [b] 5 Q. B. 671.
[c] 5 Q. B. 685.

plaintiff's son to remain in his service, but dismissing him therefrom, the plaintiff having covenanted that his son should serve the defendant for five years in the art of a surgeon-dentist, and should attend nine hours each day; and the defendant having covenanted that he would, during the five years, in case the son should faithfully perform his part of the agreement, but not otherwise, pay him certain weekly sums during the five years.

In Elderton v. Emmens, the Exchequer Chamber cited these two cases, and professed not to overrule them. It is difficult to reconcile them with that decision. According to Aspdin v. Austin, and Dunn v. Sayles, if the servant agrees to serve for a certain time, and the master agrees to pay wages, and the master dismisses the servant at the commencement, the servant may entitle himself to the whole wages by remaining out of employment during the whole time, and offering to work for the master: if he accepts of another employment before his wages are due, he loses his right. This appears to be much less reasonable than that the servant should upon his dismissal be free to seek another employment, and have his remedy against the master for the loss he has sustained by the dismissal, which would be the amount of the wages he would have received, had the employment continued for the whole term, less the amount he could earn in a new employment during the same time. Such a construction is better both for the master and the servant, and is warranted by the principle, that in events not expressly provided for, that shall be done which is most convenient for both parties; and upon which principle it has been decided, that if work is not properly done according to contract, the workman shall recover a diminished price, and shall neither recover the whole price agreed, nor entirely lose his reward. Every other instance of implied contracts depends upon the same principle.

66. If the master who is under an obligation to employ his servant wrongfully dismisses him from his service before the period for employment has expired, the remedy of the servant

is by action for the wrongful dismissal, and not for his wages. He cannot maintain an action for his wages, unless he has actually served all the time for which he claims wages.[a] He may maintain an action for wrongful dismissal, directly he has been dismissed; he need not wait until the period for which he has agreed to serve is out.[b]

67. It is also the duty of the master to pay wages in consideration of the service performed. If the relation of master and servant has subsisted, it will, in most cases, be presumed that there was an agreement, or understanding, that the servant should be paid the value of his services, although it does not appear that the parties have agreed to the amount.[c] But if relations live together, and perform acts of service for each other, the probability is that such acts are performed by way of kindness or duty, and not for reward. Thus where an illegitimate daughter had lived in her father's house, and acted as his servant for several years, though when first she came to him he had hired her as a servant for a year, at fifty shillings wages, she was considered not to have been his servant at wages during the subsequent years.[d] And where a man who had lived in his brother's house, and assisted him in carrying on his business, afterwards made a claim for his services, it was left to the jury to say, whether the parties came together on the terms that the one was to be paid by the other for his services.[e] A slave who came to England with his master, and continued with him, was held not entitled to wages from the simple circumstance of service. If an express agreement to pay wages had been made between him and his master, he would have been entitled to wages for his services after the making of such agreement, but not for previous service.[f]

[a] Archard v. Hornor, 3 C. and P. 319. Smith v. Hayward, 7 A. and E. 544. Fewings v. Tisdal, 1 Ex. 295, overruling Gandell v. Potigny, 4 Campb. 375.

[b] Paganini v. Gandolfi, 2 C. and P. 371. Dunn v. Murray, 9 B. and C. 780. [c] Bayley v. Rimmell, 1 M. and W. 506.

[d] Rex v. Sow, 1 B. and Ald. 178. [e] Davies v. Davies, 9 Car. and Payne, 87. [f] Alfred v. Fitzjames, 3 Esp. 3.

68. If a person has entered into the service of another, and served him under a special contract which has been rescinded and put an end to by the parties, it will be presumed that the master has agreed to pay the servant for the value of his services. The defendant agreed with the plaintiff's father to take him on trial, and to take him as his apprentice if he approved of him. The plaintiff served him for two years upon this understanding, and the defendant then sent him away, and refused to bind him as an apprentice. The jury finding that the contract was at an end, and that each party had treated it as rescinded, it was held that the plaintiff was entitled to a reasonable remuneration for his services.[a] On the same principle was decided the case of a clerk who engaged himself for a year, at an annual salary, whose master became bankrupt before any salary was due, and who left shortly after the bankruptcy, his services being no longer required: he was held entitled to a *pro ratâ* salary for the period during which he had served, the contract of service having been dissolved by mutual consent, and it being understood to be on the terms that he should be paid for his services actually rendered.[b] And where a superintendent of packets, in the service of a steam packet company, whose salary was payable quarterly, on the 20th October tendered his resignation, which was accepted on the 13th December, no salary having then become due,—it was held, that although no new contract arises by implication of law upon the dissolution of a special contract, in respect of services performed under such special contract previous to its dissolution,—yet it ought to have been submitted to the jury, as to whether the parties did or did not, upon the dissolution of the contract, come to a new agreement to pay for the services under it, and for which no wages had become due by the contract.[c] A carman was engaged by some tea-merchants, at the wages of £160 per

[a] Phillips v. Jones, 1 A. and E. 333. [b] Thomas v. Williams, 1 A. and E. 685. [c] Lamburn v. Cruden, 2 M. and G. 253.

annum, payable quarterly. At the expiration of the first month of his service he was guilty of misconduct, for which they dismissed him; but, at their request, he worked for them two days after his dismissal. The jury considered that the dismissal was accompanied by a new contract to pay him a month's wages for the services actually performed, in consideration of his remaining in their service two days after his dismissal.[a]

69. The value of things lost or injured by the negligence of a servant cannot be deducted from his wages, unless there is an agreement to that effect between the master and servant. If there is such an agreement, it is tantamount to an agreement that the balance of wages only shall be paid, after deducting the value of the things lost or injured.[b] Nor can the master, without an agreement to that effect, deduct money he has paid to a medical man whom he has called in to attend the servant whilst sick.[c] If the servant has not agreed to pay the doctor, or to reimburse the master, the calling him in will be understood to be an act of generosity by the master.

If the servant is an infant, the master cannot deduct from the wages any payments he may have made for the servant, unless they have been made in the purchase of necessaries. Payments made for the servant do not operate to discharge or satisfy the wages, as do payments made to her after the wages have become due; but they constitute a debt due from the servant to the master, and may be set off against the wages, if the servant is legally liable to repay them, but not otherwise. An infant, as has been stated, is not bound by contracts, unless for necessaries suitable to her degree; and therefore, in the case now put, is not liable to repay the advances. In an action by a servant of all work, for wages earned by her when under twenty-one, the master claimed to deduct £1. 10s. which he

[a] Hurcum v. Stericker, 10 M. and W. 553.

[b] Le Noir v. Burton, 4 Campb. 134. Cleworth v. Pickford, 7 M. and W. 314.

[c] Sellen v. Norman, 4 C. and P. 80.

had paid for a silk dress for her, £4. 10*s*. for a reticule and lace for caps, and other articles of finery; also payment for coach fares for her mother. Bayley, J., held that he was not entitled to the deductions. He said,—"Payments made on account of wages due to an infant for necessaries, and which could not be avoided, are valid payments; but an infant cannot bind herself for things which are not necessary. The consequences might be very injurious if the law were otherwise. What would it lead to in this very case? Here is a female, who is described as rather a showy woman, suffered to dress in a manner quite unfitted to her station, and at the end of her twelvemonths' service she would not have a farthing in her pocket."[a]

70. A master is not bound to provide his servant with medical attendance, or medicines. Although Lord Kenyon held, that in the case of a menial servant who fell sick and was supplied with medicines whilst under the master's roof, the master was liable, on the ground that the servant formed part of his family, and that he was bound, during the period of service, to find him with all necessaries, and, amongst others, medicines and medical advice,[b] yet this opinion has been overruled. The event of the servant falling sick during the service is an event not contemplated by the parties when the relation is contracted; and it has been remarked, that if masters were bound to provide their servants with necessary medicines and medical advice, many masters who are obliged to employ servants would be unable to perform their engagements. The extent of a master's liability, in the event of the servant's sickness, is to pay him his wages, and provide him with ordinary food.[c] On the trial of an indictment against a master for causing the death of his apprentice by

[a] Hedgeley v. Holt, 4 Car. and Payne, 104.

[b] Scarman v. Castell, 1 Esp. 270.

[c] Wennall v. Adney, 3 B. and P. 247. Sellen v. Norman, 4 C. and P. 80. Cooper v. Phillips, 4 C. and P. 581.

neglecting to provide him with proper nourishment, Patteson, J., told the jury, that by the general law a master was not bound to provide medical advice for a servant; yet that the case was different with respect to an apprentice, and that a master was bound, during the illness of his apprentice, to provide him with proper medicines.[a]

71. He is bound to take as much, but not more care of his servant than he may be reasonably expected to do of himself, and is not responsible for an accident which happens to the servant in the course of his service, unless he knows the service to be dangerous, and the servant does not. A butcher ordered his servant to go in a van loaded with goods. In consequence of the van being in bad repair, and overloaded, it broke down on the journey, and the servant was injured. It was held that the master was not liable. Lord Abinger, in delivering the judgment of the Court, stated the law to be,—That the mere relation of master and servant could not imply an obligation, on the part of the master, to take more care of the servant than he might be reasonably expected to take of himself;—that he was bound to provide for the safety of the servant, in the course of his employment, to the best of his judgment, information, and belief. The servant was not bound to risk his safety in the service of his master, and might, if he thought fit, decline any service in which he reasonably apprehended injury to himself; and in most cases in which danger might be incurred, if not in all, he was just as likely to be acquainted of the probability and extent of it as his master.[b]

72. The master is not bound to give the servant a character.[c] If, in giving the servant a character, he states any thing prejudicial to the servant, he is not liable, unless his statement is not only false, but malicious. In giving a character he is

[a] Regina v. William Smith, 8 C. and P. 153.
[b] Priestley v. Fowler, 3 M. and W. 1.
[c] Carrol v. Bird, 3 Esp. 201.

bound to state that which he really believes to be true; and the presumption is that he has done so.[a]

73. If a person falsely personates a master, and gives a false character to a person offering himself for a servant,—or if a person offers himself as a servant with a false character, he is liable to a penalty of £20, and, on default of payment, may be committed to prison for a term not exceeding three months nor less than one month.[b]

74. The ordinary remedies for a breach of contract, by action at law for damages, or by bill in Equity for a specific performance, are in most cases practically inapplicable to disputes between master and servant; the servant being too poor to pursue them against the master, and incapable of paying the expenses, if they are used against him. The Legislature has therefore provided cheap and summary remedies and modes of proceedings, as well for as against servants, in several cases. By these statutes the servant, without the necessity of taking any formal proceedings, or employing a lawyer, may have the master summoned before a Magistrate, if he does not pay his wages, and may recover the wages due; and may also, in some cases, be discharged from the contract to serve. Many breaches of contract, and acts of misconduct, on the part of servants, are treated as crimes, and punishable summarily with more or less severity,—especially the embezzlement of the master's property intrusted to the servant to be worked upon, which differs in nothing from theft.

Other statutes provide for the settlement, by arbitration, of disputes between masters and their workmen, in particular manufactures, relating either to the amount of wages to be paid, or the quality of the work done. The arbitrators are to be either a magistrate or a master and a workman of the trade concerning which the dispute arises, chosen in a manner calculated to secure their impartiality.

[a] Edmondson v. Stephenson, B. N. P. 8. Rogers v. Clifton, 3 B. and P. 587. [b] 32 Geo. III. c. 56.

As it would exceed the limits of this work to set out the statutes relating to disputes between masters and servants at length, such an abstract of their contents is given as shows the particular persons and cases to which they apply, and the punishments which may be inflicted.

75. By 20 Geo. II. c. 19, complaints, differences, and disputes between masters or mistresses and servants in husbandry hired for one year or longer, or artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other labourers employed for any certain time, or in any other manner, may be heard and determined by one or more Justice or Justices of the peace of the county, riding, city, liberty, town corporate, or place where the master or mistress inhabits. The Justice may order the payment of so much wages to the servant as seems just, provided the sum in question does not exceed £10 with regard to any servant in husbandry, nor £5 with regard to any artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, or labourer. If not paid within twenty-one days, it may be levied by distress and sale of the master's goods. In case of any misdemeanor, miscarriage, or misbehaviour of the servant in his service, the Justice may commit the offender to the House of Correction, there to remain and be corrected and held to hard labour for a reasonable time, not exceeding one calendar month, or may abate part of the wages, or may discharge the servant. In case of misusage, refusal of necessary provision, cruelty, or other ill-treatment by the master of the servant, the Justice may discharge the servant. From the decision of the Justice, except in the case of a commitment, there is an appeal to the Quarter Sessions.

By 27 Geo. II. c. 6, the provisions of 20 Geo. II. c. 19, are extended to tinners and miners employed in the stannaries in the counties of Devon and Cornwall.

By 31 Geo. II. c. 11, the provisions are extended to servants in husbandry, though hired for a less time than a year.

By 6 Geo. III. c. 25, if any artificer, calico-printer, handi-

craftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person, contracts with any person, for any time or times, and absents himself from his service before the term of his contract is completed, or is guilty of any other misdemeanor, a Justice of the county or place where the artificer is found, may, on the complaint of the employer, his steward, or agent, grant his warrant for the apprehension of the servant, and may, after hearing the case, commit him to the House of Correction for a term not exceeding three months nor less than one month.

By 4 Geo. IV. c. 34, if any servant in husbandry, artificer, calico-printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person, contracts with any person or persons to serve him, her, or them, for any time or times, or in any other manner, and does not enter into or commence the service according to the contract, (the contract being in writing and signed by the contracting parties,) or, having entered into the service, absents himself from the service before the term of the contract, whether it be in writing or not, is completed, or neglects to fulfil the same, or is guilty of any other misconduct or misdemeanor in the execution of the contract or otherwise respecting the same, a Justice of the county or place where the servant contracted, or was employed, or is found, may issue his warrant to apprehend the servant, and, after examination, may commit him to the House of Correction, there to remain and be held to hard labour for a time not exceeding three months, and abate a proportional part of his wages for the period of his imprisonment, or may punish the offender by abating the whole or part of his wages, or may discharge him from his service.

If the master resides at a considerable distance from the parish or place where his business is carried on, or is absent for a long period of time, either beyond the seas or at a considerable distance from the place of his business, and intrusts his business to the management and superintendence of a steward, agent, bailiff, foreman, or manager, a Justice of the

county or place where the servant is employed may summon the steward, &c., to answer the complaint of the servant touching the non-payment of his wages, and may make an order on the steward for the payment of the wages due, provided the sum in question does not exceed £10. If not paid within twenty-one days, the amount may be levied by distress and sale of the goods of the master.

The Justice may order payment of wages to any persons named in the Acts 20 Geo. II. c. 19, and 31 Geo. II. c. 11, within such period as he shall think proper; and in case of non-payment, the same may be levied out of the goods of the master. The order of the Justice under 4 Geo. IV. c. 34, is final and conclusive.

By 10 Geo. IV. c. 52, the provisions of 4 Geo. IV. c. 34, are extended to persons hired or employed to make felt or hat, or to prepare or work up woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, or silk manufactures, or any manufacture made up of wool, fur, hemp, flax, cotton, mohair, or silk, or any of those materials mixed one with another, and to journeymen dyers, and to servants and apprentices employed in the dyeing of felt or hat, or any woollen, linen, fustian, cotton, leather, fur, flax, mohair, or silk materials.

76. The statute 20 Geo. II. c. 19, extends to every description of labourer, whether employed for a certain time or to do certain work. A man was employed to dig a well, for which he was to receive two shillings a foot; he was at liberty to employ whom he pleased to assist him. It was held that he was a labourer within the statute, and that Justices had jurisdiction to order the payment of his wages. Lord Ellenborough distinguished between his case and that of a journeyman employed in an art, trade, or mystery, or other workman employed in a branch of it. The labourer appears to have been bound to devote his whole time to the work until it was finished.[a]

[a] Lowther v. the Earl of Radnor, 8 East, 113.

But a person employed by an attorney to take care of goods which had been siezed under a writ of execution was held not to be a labourer within the statute. The Court held the term "labourer" confined to those labourers the rate of whose wages Justices were empowered to fix by the statute 5 Eliz. c. 4, and that the Legislature had principally in view out-door and country labour; and that the party in that case was not within the statute, because he was employed and paid for the exercise of care and fidelity, and not for manual labour.[a]

Under the 4th Geo. IV. c. 34, the relation of master and servant must exist to authorize the Magistrate to interfere. If the contract is to do certain work, by which the workman is not bound to devote his whole time to the performance of the work, but may take it and do other work for other persons, it is not a contract to serve, and does not create the relation of master and servant, and therefore the Magistrate has no jurisdiction under the statute: thus where Hardy had contracted to weave certain pieces of silk goods at certain prices, and neglected his work, whereupon the Magistrate committed him under the statute, he recovered damages in an action against the Magistrate for false imprisonment.[b] A waller contracted to build a wall for a certain price in a certain time. He refused to complete his work, and was committed to prison by a Magistrate. It was decided that the Magistrate had no jurisdiction, because the contract did not create the relation of master and servant. It did not bind him to employ his whole time in the work, and not to work for any other person until it was finished, as appeared to have been the case in Lowther v. Earl Radnor.[c] On the same principle a man was discharged from custody who had been committed to prison by a Magistrate, because, having entered into a contract to print certain pieces of woollen-cotton goods, he had neglected to perform his contract.[d]

[a] Branwell v. Penneck, 7 B. and C. 536. [b] Hardy v. Ryle, 9 B. and C. 603. [c] Lancaster v. Greaves, 9 B. and C. 628.
[d] Ex parte Johnson, 7 Dowl. 702.

It has also been decided that the 6th Geo. III. c. 53, does not extend to domestic servants, the words "other persons" in that statute being confined to servants of the same class as those specially mentioned, that is, servants in husbandry, or some trade or business.[a]

But a person employed by a calico-printer as a designer to make drawings of the patterns which are engraved on the printing rollers, and subsequently transferred in colours to the fabric itself, is an artificer within the statute 4 Geo. IV. c. 34, or if not an artificer, he may be included within the term "other person." He is the person who sets the whole in motion, and contributes in a most material degree to the calico-printing manufacture, and may be punished by a Magistrate for a breach of his contract to serve.[b]

77. Although the language of the statute 4 Geo. IV. c. 34, is general, and empowers the Magistrate to punish a servant who absents himself from his service, it must be understood in a qualified sense, and as prohibiting merely an absence without lawful excuse. Before the Magistrate can commit, he must be convinced that there was no lawful excuse for the absence, and must express his conviction on the face of his warrant.[c] Nor does the statute empower the Magistrate to punish in a case of misconduct which is not reasonably within the execution of the contract; otherwise the Magistrate might inflict a heavier or slighter punishment than the servant was liable to by law. If, in the course of his service, the servant is guilty of a felony, such as stealing or embezzling his master's property, he is entitled to have his case considered by a jury, and the Magistrates have no jurisdiction to decide it.[d]

78. By the 20th Geo. II. c. 19, the Magistrate may commit the servant to the House of Correction, there to remain, *and be corrected.* In the other statutes it is not specified that the servant is to be corrected. This correction means whipping;

[a] Kitchen v. Shaw, 6 A. and E. 729. [b] Exp. Ormrod, 1 D. and L. 825. [c] Seth Turner's case, 9 Q. B. 80.

[d] Exp. Jacklin, 2 D. and L. 103.

and if the proceeding is taken under the first statute, it is a necessary part of the sentence; if under the other, it cannot e inflicted.[a]

79. These are the more general statutes relating to disputes between masters and servants: others are confined to particular manufactures and trades. The statute 39 and 40 Geo. III. c. 77, relates to colliers and miners, and provides,—that if any person enters into a contract or agreement in writing, to get any coal, culm, ironstone or iron ore, and wilfully, and to the prejudice of the owner, raises, gets, or works the same in a different manner to his contract, and against the will of the owner or his agent, or refuses to fulfil his engagement, one Justice may convict him in a penalty of not exceeding forty shillings and costs, and, upon non-payment, may commit him for a time not exceeding six months, or until the penalty and costs be paid. And because the owners of mines who contract for the getting of coal, ironstone or ore, by weight, are often under the necessity of advancing money to the colliers and miners, on the measure of the coals in heaps, before the same can be weighed, and frauds are practised in walling and stacking coal, ironstone or ore, by which they obtain money beyond what they earn or are able to repay, and miners often defraud each other by conveying ironstone from one heap to another,—the statute enacts, that if any person walls or stacks coal, ironstone or ore, in any false or fraudulent manner, with intent to deceive his employer, or defraud the person who raised the same, he may, on conviction before one Justice, be committed to the common gaol for a time not exceeding three months.

And by 2 and 3 Vict. c. 58, s. 10, which relates to miners in Cornwall, it is enacted,—that for the prevention and punishment of frauds in mines, by idle and dishonest workmen removing or concealing ore, for the purpose of obtaining more wages than are of right due to them, and thereby de-

[a] Rex v. Hoseason, 14 East, 605.

frauding the adventurers in, or proprietors of, such mines, or the honest and industrious workmen therein,—if any person or persons employed in or about any mine in the county of Cornwall, takes, removes or conceals the ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud the proprietor or proprietors of, or adventurer or adventurers in such mine, or any workman or miner employed therein, he is guilty of felony, and liable to be punished as for simple larceny.

80. By 13 and 14 Car. II. c. 15, s. 6, a silk-winder or doubler who unjustly, deceitfully, or falsely purloins, embezzles, pawns, sells or detains any part of silk delivered to him to wind or double, is liable to render to the party grieved such satisfaction as a Justice shall order. If he does not make satisfaction within fourteen days, he may, for the first offence, be apprehended and whipped, and set in the stocks in the parish where the offence was committed, or in some market-town near, in the same county; and for the second, he receives such further punishment, by whipping, or being put in the stocks, as the Justice thinks convenient; and by 20 Car. II. c. 6, s. 3, he may be committed to prison until he has made satisfaction, or has suffered the punishment appointed by 13 and 14 Car. II.

By 14 Geo. III. c. 44, if any person reels false and short yarn, for the first offence he is liable to forfeit not exceeding 20*s*. nor less than 5*s*.; for the second, not exceeding £5 nor less than 40*s*.; and for the third, and every other offence, he may be committed to prison, to be kept to hard labour, for a calendar month, and may also be publicly whipped, at the market-town nearest to the place where the offence was committed, on a market-day.

The statute 6 and 7 Vict. c. 40, extends to the manufacture of woollen, worsted, linen, cotton, flax, mohair, or silk materials, in, on, or by the stocking-frame, warp-machine, or any other machine employed in the manufacture of frame-

work, knitted, or looped fabrics, and every trade, occupation, operation, or employment connected with or incidental to the manufacture of stockings, gloves, and other articles of hosiery.[a]

By this statute, if a person intrusted with woollen, worsted, linen, cotton, flax, mohair, or silk materials, for the purpose of being prepared, worked up, or manufactured, or with any tools or apparatus for manufacturing such materials, sells, pawns, purloins, embezzles, secretes, exchanges, or otherwise frauduently disposes of the materials, tools or apparatus, he is liable to a penalty not exceeding £10, together with the costs of the proceedings. The penalty may be levied by distress; and if there is no sufficient distress, he may be committed to prison, with or without hard labour, for a term not exceeding three calendar months, unless the penalty and costs be sooner paid.[b]

If the person intrusted with the materials, tools or apparatus neglects to return them for fourteen clear days after being required so to do by the party intrusting him therewith, or by some person on his behalf, by notice in writing served upon him, or left at his last or usual place of abode or business, unless prevented by some reasonable or sufficient cause, he is liable to the same penalty and punishment as if he had embezzled them.[c]

If a person intrusted with materials to be manufactured does not manufacture and return them within seven clear days after the time agreed upon, or, if no time has been agreed upon, within seven clear days after being required so to do (unless prevented by some reasonable and sufficient cause)—or leaves or returns the materials without having performed, as he could and ought to have done, the work he was employed to perform, and without the consent of his employer—or damages the materials—or if he contracts to perform any work in any of the said manufactures by himself or by others, and neglects

[a] S. 34. [b] S. 2. [c] S. 3.

to fulfil his contract, or absents himself from his work, he is liable to forfeit a sum not exceeding £2, and the amount of the injury done to the materials, together with costs. In default of payment of the penalty and costs, he may be committed to prison, with or without hard labour, for a term not exceeding two calendar months, unless the penalty and costs be sooner paid.[a]

If the manufacturer neglects to pay the workman his wages, the workman may summon him before two Justices, who may order payment of the wages due, together with costs for loss of time and recovering the same; which wages and costs may be levied by distress, and the Justices may authorize the workman to return his work unfinished.[b]

Frames, materials, and tools not belonging to the workman are not liable to be distrained for rent due from the workman.[c]

By 7 Jac. I. c. 7, a sorter, carder, kember, spinster, or weaver of wool or yarn, who unjustly conveys away, embezzles, purloins, sells or detains any part of the wool or yarn delivered to him by a clothier, is to make satisfaction to the owners; and if he has not sufficient, he may be whipped and set in the stocks.

By 14 Geo. III. c. 25, if a workman employed in the manufacture of woollen cloth, or preparing materials for that purpose, fails to return the tools and materials delivered to him, or does not give a satisfactory account of the same to his employer, when required, or fraudulently steams, damps, or waters the wool or yarn, or takes off, cuts, or picks out the list, forrel, or other mark of the price of cloth, he may be committed by one Justice for a calendar month; for a second offence, he may be sentenced by the Sessions to three calendar months' imprisonment; and, on a second conviction at the Sessions, he may be imprisoned for six calendar months, and once publicly whipped.

[a] S. 7. [b] S. 17. [c] S. 18.

81. By 1 Anne, statute 2, c. 18, which, although repealed by 6 and 7 Vict. c. 40, so far as it relates to the woollen, linen, cotton, flax, mohair, and silk manufactories, is still applicable to the iron manufacture, a person employed in working up iron, who embezzles or purloins the materials, forfeits double the value of the damages, and on default of payment may be committed until he makes satisfaction; or if it appear to the Justice that he is not able to make satisfaction, he may be whipped, and imprisoned for a period not exceeding fourteen days.

The 13th Geo. II. c. 8, inflicts on a person hired or employed in working up iron manufactures, who purloins, embezzles, secretes, sells, pawns, exchanges, or otherwise illegally disposes of any of the materials which he is intrusted to work up, double the value of the damages, together with costs, for the first offence. If he does not immediately pay the penalty, he is to be committed to the House of Correction, there to be whipped and kept at hard labour for a time not exceeding fourteen days. For the second or subsequent offence, the penalty is four times the value of the damages, together with costs; and on non-payment, imprisonment with hard labour for a time not exceeding three months, nor less than one month, and a public whipping.

82. By the same statute similar penalties are imposed upon persons hired or employed in cutting, paring, washing, dressing, sewing, making up or otherwise manufacturing gloves, breeches, leather and skins, boots, shoes, slippers, wares, or other goods or materials to be made use of in any of the trades or employments relating to the manufacture of leather and skins, who fraudulently purloin, embezzle, secrete, sell, pawn or exchange any of the materials which they are intrusted to manufacture, or who purloin, embezzle, secrete, pawn or exchange any gloves, breeches, boots, shoes, slippers or wares, when manufactured, or who do or wilfully permit any act whereby the value of the things delivered to them is lessened.

And a workman in this branch of trade who neglects the performance of his work, either by procuring or permitting himself to be subsequently retained by another master before he has completed the work for which he was first employed, may be imprisoned and set to hard labour for a month or less.

The statutes 22 Geo. II. c. 27, and 17 Geo. III. c. 56, relate to the manufacture of felts and hats, and to iron, leather, fur, and hemp manufactures. By these statutes, penalties are imposed upon workmen who embezzle, secrete, sell, pawn, exchange or otherwise unlawfully dispose of materials with which they are intrusted; or tools or implements intrusted to them for manufacturing the materials; or drugs or ingredients for dyeing, preparing, or manufacturing the same; and for wilfully neglecting the performance of their work for eight days successively; and after having taken in materials to be manufactured for one master, for taking in materials for manufacture from another master; and for suffering themselves to be employed or retained in any other occupation sooner than eight days before the completion of the work first taken; and for receiving materials in a fictitious name, in order to be manufactured; and after receiving them in his own name, to be manufactured by himself, delivering them or any part to another to be manufactured without the owner's consent; and for not returning, when required by the owner, so much of the materials delivered to be manufactured as have not been used.

The 17th section of 17 Geo. III. c. 56, inflicts penalties on journeymen-dyers, servants, or apprentices, hired, retained, or employed in dyeing felt or hat, leather, fur or flax materials, who, without the consent of their masters, dye any of such materials, whether wrought or unwrought, or receive them for the purpose of dyeing, and on those who procure the materials to be dyed by the journeymen.

By 14 Geo. III. c. 44, the penalty imposed on workmen in woollen and other manufactures for reeling false or short yarn is mitigated to a sum not more than 20*s*. nor less than 5*s*. for the first offence; not more than £5 nor less than 40*s*. for the

second; and imprisonment for one calendar month, with hard labour and a public whipping, for the third and subsequent offences.

83. By 27 Geo. II. c. 7, a workman hired or employed by any one practising the trade of clock-making or watch-making, or any part or branch thereof, to make, finish, alter, repair or clean any clock, watch, or part thereof; or intrusted with any gold, silver, or other metal or material to be or which is in the whole or in part wrought or manufactured for any part of a clock or watch, or any diamond or other precious stone to be or which is set or fixed in or about any clock or watch, who purloins, embezzles, secretes, sells, pawns, exchanges or otherwise unlawfully disposes of any clock, watch, gold, silver, metal, material, diamond, or precious stone, may be punished by a Justice. The penalty is £20 for the first offence, and £40 for the second. In default of payment of the penalty, he may be imprisoned, with hard labour, for fourteen days, and once publicly whipped, for the first offence; and for the second offence he may be imprisoned, with hard labour, three months, and whipped twice or oftener.

84. By 7 Geo. I. statute 1, c. 13, a journeyman tailor or servant in the art of a tailor, within the Bills of Mortality, who departs from his service before the end of his term, or before his work for which he was hired is finished, or, not being retained or employed, refuses to enter into work, unless for cause to be allowed by two Justices, may be imprisoned and kept at hard labour for a period not exceeding two months.

85. By 9 Geo. I. c. 27, a journeyman shoemaker who embezzles boots, shoes, slippers, or materials, may be convicted by one Justice in the amount of damage sustained by the master; and in default of payment, may be imprisoned, with hard labour, for a period not more than a month nor less than fourteen days. If, being retained by one master, he neglects his work by suffering himself to be retained by another before he has finished his work, he may be imprisoned, with hard labour, for a time not exceeding a month.

86. Another mode of settling disputes between masters and workmen is by arbitration, under the statute 5 Geo. IV. c. 96. The following subjects of dispute between masters and workmen, and between workmen and those employed by them in any trade or manufacture, may be arbitrated under the statute. Disagreements respecting the price to be paid for work done or in the course of being done, whether such disputes respect the payment of wages agreed on, or the hours of work agreed on, or damage done to the work, or delay in finishing the work, or the not finishing the work in a good and workmanlike manner, or according to contract, or to bad materials;—cases where the workmen are employed to work a new pattern which requires them to purchase new implements, or to make alterations upon old implements for the working thereof, and the masters and workmen cannot agree upon the compensation to be made to the workmen in respect thereof;—disputes respecting the length, breadth, or quality of pieces of goods, or, in the case of the cotton manufacture, the yarn thereof, or the quantity and quality of the wool thereof;—disputes respecting the wages or compensation to be paid for pieces of goods made of any great or extraordinary length;—disputes in the cotton manufacture respecting the manufacture of cravats, shawls, policat, romal, and other handkerchiefs, and the number to be contained in one piece of such handkerchiefs;—disputes arising out of, for, or touching the particular trade or manufacture, or contracts relative thereto, which cannot be otherwise mutually adjusted and settled;—disputes between masters and persons engaged in sizing or ornamenting goods. But Justices are not authorized to establish a rate of wages, or price of labour or workmanship, at which the workman shall in future be paid, unless with the mutual consent of both masters and workmen. Complaints by a workman as to bad materials must be made within three weeks of his receiving the same,—complaints for any cause within fourteen days after the cause of complaint has arisen.[a]

[a] S. 2, 7 Wm. IV. and 1 Vict. c. 67, s. 1.

Whenever such subjects of dispute arise, either the master or workmen may demand and have an arbitration. They may come before, or agree by writing under their hands to abide by, the decision of any Magistrate of the place where the complainant resides, and he may decide the dispute. If the parties do not appear before the Magistrate, or do not agree to refer the dispute to him, he may summon one party on the complaint of the other, and on the return of the summons, if the cause of complaint continues, he may nominate four or six persons resident in or near the place where the dispute has arisen, one half being master manufacturers, or agents, or foremen of masters, and the other half, workmen in the particular manufacture: out of the masters so nominated, the master is to choose one, and out of the workmen, the workman is to choose one, and the two so chosen have full power to settle the dispute.[a]

If either of the arbitrators refuses or delays to accept the arbitration, or neglects to act therein for two days, the Magistrate may appoint another in his stead. If the second arbitrator does not attend, the first may act by himself.[b] The Magistrate is to appoint a time and place of meeting, and to give notice to the arbitrators and parties to the dispute, and to certify the nomination and appointment in a form prescribed. The arbitrators are to examine the parties and their witnesses, and to determine the dispute within two days after their nomination, exclusive of Sunday. Their decision is final and conclusive.[c] If the complaint is by a workman, of bad warps or utensils, the place of meeting is to be at or as near as may be to the place where the work is carrying on; in other cases, at or as near as may be to the place where the work was given out.[d] If either fails to attend the appointment of arbitrators, the Magistrate may appoint one for him, out of the persons proposed for the absentee's selection.[e]

[a] S. 3, 7 Wm. IV. and 1 Vict. c. 67, s. 2.
[b] S. 4. [c] S. 5. [d] S. 6. [e] S. 7.

The arbitrators are to inspect the work, if necessary, and to examine the parties and their witnesses.[a] They have power to compel the attendance of witnesses, and to punish them if they refuse to give evidence, by complaining to a Magistrate, who may commit the refractory witness for not more than two calendar months nor less than seven days.[b]

If the arbitrators cannot, within three days, agree, they are to go before the Magistrate by whom they were appointed, or, in his absence, before another of the district where the meeting was held, and state to him the points on which they differ, and he is to decide the case upon their statement within two days.[c] If one of the arbitrators refuses to go before the Magistrate, he may, after summoning him, decide the case on the statement of the other.[d]

In all cases in which masters and workmen agree that their disputes shall be decided by arbitration, whether the cases are those mentioned in the Act or not, and although the mode of arbitration is different from that prescribed by the Act, the award has the same effect as an award under the Act, and may be enforced in the same way.[e]

If the work has been delivered by an agent or servant of the master, the proceedings may be taken against the agent or servant, and are binding on the principal; and if the business is carried on by a partnership, proceedings against one partner are binding on all.[f] If the master becomes bankrupt, or assigns his property, the award may be enforced against the assignees or trustees, who must satisfy the workman out of the property assigned.[g] If the complainant is a married woman, or infant, proceedings may be taken in the name of the husband of the married woman, or of the father; or if he be dead, of the mother; or if both be dead, of one of the kindred, or of the surety under an apprentice deed of the infant.[h]

[a] S. 8. [b] S. 9. [c] S. 10.
[d] S. 11. [e] S. 13. [f] S. 14.
[g] S. 16. [h] S. 17.

Either party may appoint a deputy in the matter of the arbitration.[a]

If the parties agree, a ticket may be delivered by the manufacturer to the workman, with the work; which ticket, in the event of dispute, is evidence of all things mentioned therein.[b] The master may keep a duplicate of the ticket, which is evidence if the workman does not produce the original.[c]

If a master does not, by himself, his clerk, or foreman, object to work within twenty-four hours after he has received it, he is not allowed afterwards to make any complaint in respect of the work so received.[d]

The parties may agree to extend the time limited by the Act for making the award. This agreement must be written on the back of the magistrate's certificate, and certified and signed by each party in the presence of a witness.[e] The award should be written on the back of the certificate, and should be in a form prescribed by the Act.[f] When the award has been performed, the party in whose favour it is made should give an acknowledgment on the back of the certificate, in a prescribed form.[g]

The arbitrators, or Magistrate when he decides the dispute, have power to settle the expenses of the arbitration, including compensation for loss of time.[h]

The award may be enforced by distress and imprisonment.[i]

By 8 and 9 Vict. c. 77, manufacturers of woollen, worsted, linen, cotton, or silk hosiery, are bound to deliver to the workman, with the materials, a ticket of the materials and work to be done, containing certain specified particulars, under a penalty not exceeding £5; and the ticket, or duplicate kept by the manufacturer, is evidence in case of disputes. If the dispute relates to the improper or imperfect execution of the work, the work must be produced, and if not produced, must be taken to be properly executed. Power is given to the Magistrate to summon witnesses, and a penalty of £2 is imposed

[a] S. 15. [b] S. 18. [c] S. 19. [d] S. 20. [e] S. 21.
[f] S. 22. [g] S. 23. [h] S. 31. [i] S. 24.

on a witness who has been paid or tendered his reasonable expenses, and does not attend in obedience to the summons.

By 8 and 9 Vict. c. 128, manufacturers of silk goods, or goods made of silk mixed with other materials, are bound to deliver to the weavers, unless both parties by writing under their hands agree to dispense therewith, a ticket stating the count or richness of the warp or cane; the number of shoots or picks required in each inch; the number of threads or weft to be used in each shoot; the name of the manufacturer, or the style or firm under which he carries on his business; the weaver's name, with the date of the engagement; the price in sterling money agreed on for executing each yard imperial standard measure of 36 inches of such work in a workmanlike manner; and are bound to make and preserve, until the work has been completed and paid for, a duplicate of the ticket: the ticket or duplicate is evidence in cases of disputes. If the subject of dispute relates to the improper or imperfect execution of the work, it must be produced; if not, it must be taken to be sufficiently and properly executed. Witnesses may be summoned, and if, on being paid or tendered their expenses, they disobey the summons, they are liable to a penalty of £5.

Jurisdiction is given to two Justices to order payment of wages to weavers, together with costs for loss of time, and to authorize weavers, in cases where their wages are not paid, to return their work unfinished, and to fine manufacturers for neglecting to pay wages,—£5 for the first offence, £10 for the second, and £5 extra for every subsequent offence, unless they have delivered to the weavers, within twenty-four hours after their refusal to pay, a note in writing, stating their reasons, and that they intend to have the work arbitrated.

87. A subject connected with the Law of Contracts between master and servant is the law relating to the combination between workmen, for the purpose of compelling masters to raise their wages or alter the conditions of their service. Such combinations are the very reverse of the contracts already treated of,—contracts being combinations to work,

and combinations being contracts not to work. They are obviously illegal, and not binding on the parties to them, as being in restraint of trade. If it is attempted to enforce them, or to compel workmen to become parties to them by violence or threats, the persons so acting are liable to punishment as criminals.

The law against combinations is contained in the statute 6 Geo. IV. c. 129, which recites, that combinations among workmen for fixing the wages of labour, and for regulating and controlling the mode of carrying on manufactures and trades, are injurious to trade and commerce, dangerous to the tranquillity of the country, and especially injurious to the interests of all who are concerned in them; and enacts, that if any person shall, by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any journeyman manufacturer hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to return his work before the same shall be finished, or prevent or endeavour to prevent any journeyman manufacturer, workman, or other person, not being hired or employed, from hiring himself to or from accepting work or employment from any person or persons; or if any person shall use or employ violence to the person or property of another, or threats or intimidation, or shall molest or in any way obstruct another for the purpose of forcing or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty,—or on account of his not belonging to any particular club or association, or not having contributed, or having refused to contribute to any common fund, or to pay any fine or penalty,—or on account of his not having complied, or of his refusing to comply with any rules, orders, or regulations made to obtain an advance or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, trade, or business, or the

management thereof;—or if any person shall, by violence to the person or property of another, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any manufacturer, or person carrying on any trade or business, to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, trade, or business,—or to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants,—every person so offending, or aiding, abetting, or assisting therein, being convicted thereof, in the manner recited in the Act, shall be imprisoned only, or shall and may be imprisoned and kept to hard labour for any time not exceeding three calendar months.[a]

Persons who meet for the sole purpose of consulting upon and determining the rate of wages and prices which those present shall demand for their work, or the time for which they shall work, or who enter into any agreement for the purpose of fixing the wages or time for which they will work, are declared not to be liable to any punishment for so doing.[b] And persons who meet for the sole purpose of consulting and determining the wages they shall pay to their workmen, and the time of working in any manufacture, trade, or business, or who make any agreement for any such purpose, are also declared to be exempt from punishment.[c]

Persons who offend against the Act are compellable to give evidence; and in case they give evidence, are indemnified from any prosecution for the offence to which their testimony relates.[d] A Justice of the peace may summon an offender before two Justices: if he does not appear, the two Justices may grant their warrant for his apprehension, and upon his appearance, or proof that he has absconded, they may convict him.[e] The Justices may summon witnesses: if they disobey the summons, or refuse to give evidence, they may be committed to prison for three calendar months, or until they submit to be examined.[f] An appeal is given to the Quarter

[a] S. 3. [b] S. 4. [c] S. 5. [d] S. 6. [e] S. 7. [f] S. 8.

Sessions, and the execution of the conviction appealed upon may be suspended, if the appellant, with two sufficient sureties, enter into a recognizance, in the sum of £10 each, conditioned to prosecute the appeal and pay the costs.[a] No master in the trade or manufacture to which the offence relates can act as a Justice under the Act.[b]

The statute 9 Geo. IV. c. 31. s. 25, also provides, that if a person is found guilty on an indictment for an assault committed in pursuance of a conspiracy to raise the rate of wages, the Court may sentence him to imprisonment, with or without hard labour, for any term not exceeding two years, and may also fine him, and require him to find sureties for keeping the peace.

A combination amongst workmen to raise the price of labour is a violent and unnatural interference with the laws of demand and supply which regulate the price of labour, and is more injurious to the workmen themselves than to any one else. The immediate effect of a combination is to throw the parties to it out of employment, and deprive them of their means of support. If successful, it raises the price of the commodity, and diminishes the demand for it, and for the labour of the workmen employed in producing it. A combination has sometimes the effect of compelling masters to introduce new workmen into their trades; and while it decreases the fund to be divided amongst the labourers, increases the number of those who are to be supported by it. It tends therefore to diminish the demand for labour, and to increase the supply of it. It can never be ultimately successful, because the superfluous labourers who are deprived of work by the first consequence of the combination, must go on competing for employment until the demand for their work is increased so as to employ them all, which it cannot be until prices and wages are brought to their former level, or below it.

The only mode by which workmen's wages can be permanently and effectually raised, is by the demand for labour in-

[a] S. 12. [b] S. 13.

creasing faster than the supply. This may happen in the case of particular workmen, by an improvement in their skill beyond that of their fellows. In the case of the general body of workmen in a particular trade, their condition may be improved by an extension of the demand for the commodities they produce, which can only be caused by producing the things more quickly and cheaply, and thereby increasing the class of persons who use them. But the condition of the general body of workmen can only be improved by an increased production of the necessaries and conveniences of life, so that there may be enough for all. If these increase in sufficient quantity, every workman will be enabled to have them, however low his wages; if they do not, he cannot, however high his wages. Thus, supposing a sufficient quantity of stockings are not manufactured for every person in the kingdom, some must go without; but if more than sufficient are manufactured, every workman will be able to have stockings, because the prices must fall so as to be within the means of the workman who receives the lowest wages, or the stockings must remain unsold and useless to the manufacturer.

Combinations are usually entered into upon the supposition that the workman does not receive his fair share of the profits of the manufacture. Upon this subject the observations in a recent Edinburgh Review are worthy of attention. "The capitalist and the workman are joint agents,—co-operative partners, in fact,—in the production of a certain article (say cotton cloth), and joint sharers in the profit arising out of the sale. The capitalist supplies funds, machinery, and superintendence; the workman supplies handicraft skill and manual labour. At the end of the year, or of some shorter period, the net returns are to be divided between them, in a proportion either formally agreed upon or tacitly decided by custom.

"But the labourer is a poor man; he has no store in his cupboard, and no money in his purse. He must purchase food, clothing, and shelter from day to day, and therefore cannot wait until the end of the year to receive his share of

the common gain. The capitalist, therefore, should advance to him what it is thought probable that his share will amount to, minus, perhaps, the interest on the advance, and possibly some further small deduction to compensate the risk of having over-estimated the workman's share.

"But further, the results of a manufacturing enterprize are sometimes not profit, but loss,—always occasional loss,—frequently loss for years together,—sometimes, even, loss on the whole. But the workman, who could not bear to wait, can still less bear his share of the loss: the capitalist has therefore to encounter all the losses, for he cannot call upon the labourer to refund the wages he has received.

"The original compact (tacit or formal) by which the division of profits would have been otherwise determined has thus become modified, for the convenience of the workman, into the form in which we at present see it. The workman receives his share of the profits before any profits are made; he receives his share in years in which no profit is made; he receives it in years in which profits are turned into losses; he receives it sometimes when the master is being gradually ruined in the partnership, which, if he be but prudent, will have enriched him. What deductions from his original share should be made in consideration of all these predicates? It is evident that, in common justice, he cannot expect to receive as much as if he waited till profits were realized, and bore his proportion of losses when losses were incurred.

"The workman's wages, then, are his share of the profits commuted into a fixed payment. This commuted share he is sure of receiving as long as the manufacturing enterprize in which he is engaged actually goes on. The capitalist alone endures all the losses, alone furnishes all the advances, alone encounters the risk of ruin, and receives only the share of profit which may remain over after the labourer's commuted share is paid. The workman's share is a first mortgage,—the capitalist's share is only a reversionary claim." [a]

[a] Edinburgh Review, April, 1849, p. 427.

It may be added, that when capitalists receive more than their just share of profits, their capital increases faster than they can find use for it, and they embark it in undertakings by which they employ labour to the profit of the labourer, but to their own loss. This is generally true; unprofitable speculation, or in other words, the employment of labour which is solely beneficial to the labourer, being the natural result of the too rapid accumulation of capital: although there are some men who, from peculiar sagacity or good fortune, choose only profitable investments of capital, and avoid the bad; and others who, from different causes, adopt an opposite course. The result is the same to the labourer, for, however capital is employed, it is always to his advantage.

All the money or capital in the world is constantly being used in the employment of labour: the faster it circulates, the more labourers are employed, and the better is their condition. The combination of and stoppage of work by workmen does not hasten the circulation of capital, and therefore is not the remedy for the evils they suffer. On the contrary, the circulation of capital is increased by the subordination of the workman to his employer. The more complete this subordination, the greater is the confidence of the capitalist in the labourer, and the more readily is he induced to employ his capital.

A combination is always an evil, because it involves a stoppage of work: the things which would have been produced in the interval are lost to the consumer; the wages that would have been earned are lost to the workman; and the profits that would have been made are lost to the employer, and the circulation of capital is impeded.

Although by law the master and servant are free to make any bargain they please, as to the quantity of work to be done and the amount of wages to be paid, and the servant ought not, by combining with others not to work, to compel his master to raise his wages, it is the duty of the master, who knows better than the servant what his services are worth to him, to give him a fair reward for his labour,—a duty recognized by the

highest authority.—"Thou shalt not oppress an hired servant that is poor and needy, whether he be of thy brethren, or of thy strangers that are in thy land within thy gates. At his day thou shalt give him his hire, neither shall the sun go down upon it; for he is poor, and setteth his heart upon it; lest he cry against thee to the Lord, and it be sin unto thee." [a]

And Jeremiah has denounced—"Woe unto him that buildeth his house by unrighteousness, and his chambers by wrong; that useth his neighbour's service without wages, and giveth him not for his work." [b]

FORMS OF CONTRACTS.

I.—*Contract to build a House, &c. under the Superintendence of a Surveyor; with a Surety for the Builder.*

AGREEMENT made the day of , in the year of our Lord , between T. G., of , Builder, of the first part; T. C., of , of the second part; and J. B., of , of the third part.

WHEREAS the said J. B. is possessed of a piece of ground situate , upon which he is desirous of erecting a dwelling-house and offices according to the elevation, plans, and specification prepared for that purpose by W. M., surveyor, and under the direction and to the satisfaction of the said W. M. or other surveyor for the time being of the said J. B., his executors, administrators or assigns, which said elevation, plans, and specification are marked with the letters A, B, C, D, E, F, and G, and are signed by the said T. G., T. C., and J. B., and the said specification is contained in the schedule hereunder written, or hereunto annexed; AND the said T. G. has proposed to erect and complete the said dwelling-house and offices, and to make and execute all other works mentioned and specified in the said elevation,

[a] Deut. xxiv. 14 and 15. [b] Jeremiah xxii. 13.

plans, and specification, within the time hereinafter limited for that purpose, and according to the stipulations and agreements hereinafter contained, at or for the price or sum of £4480, which proposal the said J. B. hath agreed to accept on the said T. G., together with the said T. C. as his surety, entering into the agreements hereinafter contained:

Now IT IS HEREBY WITNESSED, That the said T. G. and T. C. do for themselves, their heirs, executors and administrators, and each and every one of them doth for himself, his heirs, executors and administrators, hereby agree with and to the said J. B., his executors, administrators and assigns, in manner following: (that is to say) that he the said T. G. shall at his own costs and charges forthwith erect and complete, make and execute, with all proper and necessary materials, workmanship and labour of the best kinds in every respect, and in the most substantial and workmanlike manner, upon the said piece of ground, a dwelling-house and offices behind the same, with the appurtenances and all other works, matters and things mentioned and specified in the said elevation, plans, and specification, under the direction and to the satisfaction of the said W. M. or other the surveyor for the time being of the said J. B., his executors, administrators or assigns; AND for that purpose shall find and provide all proper and necessary materials, tools, scaffolding, cartage, cordage, and other implements and machinery; and shall make good all damages which may be occasioned either to the said dwelling-house, offices and works, or any of them, or to adjoining buildings, by the execution of the same works or any of them; and shall cleanse all bog-holes, drains, and cesspools in or about the premises, and cart and clear away at such times and in such manner as shall or may be directed by the said W. M. or other surveyor as aforesaid, all surplus earth and waste or useless materials, implements, and machinery which may from time to time remain during the execution of the same works, or at the completion thereof; AND ALSO shall pay and discharge all fees now due, or hereafter to become due, to the district surveyor or surveyors

in respect of the premises, and shall indemnify the said J. B., his executors, administrators and assigns, of and from the same fees, and all claims and demands on account thereof; And shall at his own costs and charges from time to time, until the said dwelling-house, offices, and works shall be erected, completed, made, and executed, and the said J. B., his executors, administrators or assigns, shall take possession of the premises, insure or cause to be insured, in the joint names of the said J. B., his executors, administrators or assigns, and of the said T. G., his executors or administrators, and for the sum of £4500, all and singular the erections and buildings for the time being standing on the said piece of ground, to the full value thereof, in some or one of the public insurance offices in London or Westminster, and shall deliver the policy of insurance to the said J. B., his executors, administrators and assigns, and shall produce and show to the said J. B., his executors, administrators or assigns, the receipts for the premium and duty attending such insurance from time to time, when requested so to do; and that in case of fire, all the monies to be recovered by virtue of such insurance shall forthwith be applied in reinstating the premises, under the direction and to the approbation of the said W. M. or other surveyor as aforesaid: and that the said T. G. shall well and sufficiently cover in, or cause to be covered in, the dwelling-house and offices so to be erected as aforesaid, before the day of ; and shall complete, make and execute, or cause to be completed, made and executed, all and singular the said dwelling-house, offices, and other works in manner aforesaid, and according to the true intent and meaning of these presents, before the day of ; and that if the said T. G., his executors or administrators, shall not so well and sufficiently cover in the said dwelling-house and offices before the said day of , or shall not so complete, make and execute the said dwelling-house, offices, and works, before the said day of , they the said T. G. and T. C. shall pay to the said J. B. the

sum of £5 for every week during which the said dwelling-house and offices shall remain uncovered in after the said day of , and the like sum for every week the said dwelling-house, offices, and works shall remain unfinished after the said day of ; which sums may be recovered as liquidated damages, or may be deducted from the sums payable to the said T. G. under this agreement. PROVIDED ALWAYS, that in case the said J. B., his executors, administrators or assigns, or his or their surveyor, shall require any extra or additional works to be done, or shall cause the works to be delayed in their commencement or their progress, the said T. G. shall be allowed to have such additional time for covering in and finishing the said buildings and works, beyond the said days above fixed, as shall have been necessarily consumed in the performance of such extra or additional works, or as shall have been lost by the delay caused by the said J. B., his executors, administrators or assigns, or his or their surveyor as aforesaid; and the said payments for delay shall not become payable until after the expiration of such additional time or times.

AND the said T. G. and T. C. do hereby further agree with the said J. B., that in case the said W. M. or other surveyor as aforesaid shall be dissatisfied with the conduct of any workman employed by the said T. G. in the said works, or with any materials used or brought upon the said premises for the purpose of being used in the said works, and shall give notice thereof in writing under his hand to the said T. G., he the said T. G. will forthwith discharge such workman from the said works and remove the said materials; and that in case the said T. G. shall not, in the judgment of the said W. M. or other surveyor as aforesaid, employ a sufficient number of workmen in the execution of the said works, or have on the premises a sufficient quantity of materials, tools or implements of proper quality for the said works, and the said W. M. or other surveyor as aforesaid shall by writing under his hand require the said T. G. to employ an additional number of workmen, or bring

upon the premises an additional quantity of materials, tools or implements of proper quality, and shall specify in such notice the number and description of additional workmen to be employed, and the quantity and description of additional materials, tools or implements to be supplied, and the said T. G. shall forthwith employ in the said works such additional number of workmen, and shall forthwith bring upon the premises such additional quantity of materials, tools or implements for the said works; and that in case he shall refuse or neglect for the space of seven days to comply with any such notice or request, it shall be lawful for the said W. M. or other surveyor as aforesaid to dismiss and discharge the said T. G. from the further execution of the said works, and for the said J. B., his executors, administrators and assigns, to employ some other person to complete the same; and that in such case the sum agreed to be paid to such other person to complete the said works (such sum being approved by the said W. M. or other surveyor as aforesaid) shall be deducted from the said sum of £4480, and the balance, after making any other deductions which the said J. B. shall be entitled to make under this agreement, shall be paid by the said J. B. to the said T. G. in full for the work done by him, at the expiration of one month after he shall have been so discharged as aforesaid: And it is hereby further agreed by and between the parties hereto, that all the materials brought upon the said piece of ground for the purpose of being used in the said buildings, except such as shall be disapproved of by the said W. M. or other surveyor as aforesaid, shall, immediately they shall be brought upon the said premises, become the property of the said J. B., and shall be used in the said works.

And the said J. B. doth hereby, in consideration of the works so agreed to be done by the said T. G., agree with the said T. G., that he the said J. B. shall pay to the said T. G. for the same the said sum of £4480 in manner following; that is to say, the sum of £150 within one week after the said W. M. or other surveyor as aforesaid shall have certified in writing to the said J. B., his executors, administrators or assigns, under

his hand, that work to the value of £200 has been done under this agreement, and the further sum of £150 within one week after the said W. M. or such other surveyor shall have certified as aforesaid that further work to the value of £200 has been done under this agreement, and so on shall pay £150 for every £200 worth of work so certified as aforesaid, until the whole of the said works shall be finished, and shall pay the balance remaining unpaid within one month after the said works shall have been completed and finished to the satisfaction of the said W. M. or such other surveyor, and the said W. M. or such other surveyor shall have certified to the said J. B. that the said works have been completed and finished to his satisfaction. PROVIDED ALWAYS, and it is hereby further agreed by the parties hereto, and particularly by the said T. G. and T. C., that if the said J. B., his executors, administrators or assigns, shall at any time or times be desirous of making any alterations or additions in the erection or execution of the said dwelling-house, offices, and other works, then and in such case the said T. G. shall erect, complete, make and execute the said dwelling-house, offices, and other works, with such alterations and additions as the said J. B., his executors, administrators or assigns, or the said W. M. or such other surveyor, shall from time to time direct by writing under his or their hand or hands, and to the satisfaction of the said W. M. or such other surveyor; and the sum and sums of money to be paid or allowed between the said parties in respect of such alterations and additions shall be settled and ascertained by the said W. M. or such other surveyor, whose determination shall be final. PROVIDED ALSO, and it is hereby further agreed, that in the settling and ascertaining the said sum or sums of money, the said W. M. or such other surveyor shall not include any charge for day-work, unless an account thereof shall have been delivered to the said J. B., his executors, administrators or assigns, or the said W. M. or such other surveyor, at the end of the week in which the same shall have been performed. PROVIDED ALSO, and it is hereby further

agreed, that no such alteration or addition shall release the said T. G. and T. C., their executors or administrators, or any or either of them, from the observance and performance of the agreements herein contained on the part of the said T. G., his executors or administrators, to be observed and performed, so far as relates to the other parts of the said dwelling-house, offices, and works; but that the same agreements shall in all respects be observed and performed in like manner as if no such alteration or addition had been directed. PROVIDED ALSO, and it is hereby agreed, that if the said W. M. shall die, or cease to act as the surveyor of the said J. B., his executors, administrators or assigns, and the said T. G., his executors or administrators, shall be dissatisfied with the surveyor for the time being, to be appointed by the said J. B., his executors, administrators or assigns, then it shall be lawful for the said T. G., his executors or administrators, at his own expense, to employ a surveyor on his behalf in the adjustment of the accounts, to act with the surveyor for the time being of the said J. B., his executors, administrators or assigns; and in case of disagreement between such two surveyors, they shall be at liberty to nominate a third; and the said three surveyors, or any two of them, shall and may exercise all the powers and discretion which the said W. M. could or might have exercised under or by virtue of these presents, if he had lived and continued to act as the surveyor of the said J. B., his executors, administrators or assigns. And it is hereby further agreed, that if the said T. G., his executors or administrators, shall so employ a surveyor on their behalf, he shall be nominated within ten days after the said T. G. shall be informed of the surveyor for the time being appointed by the said J. B., his executors, administrators or assigns, and notice in writing shall forthwith be given of such nomination to the said J. B., his executors, administrators or assigns. IN WITNESS, &c.

SCHEDULE.—[The Specification referred to by the foregoing Articles of Agreement.]

II.—*Sub-contract between a Builder and a Carpenter.*

AGREEMENT made the day of , in the year of of our Lord , between T. G., of , Builder, and C. D., of , Carpenter.

WHEREAS the said T. G. hath entered into a contract with J. B., of, &c., to erect a dwelling-house and offices according to certain plans, elevations, and specifications referred to in the said contract, under the superintendence of W. M. or other surveyor of the said J. B., and which contract is dated the day of ; NOW it is hereby agreed, that in consideration of the sum of £ , to be paid by the said T. G. to the said C. D. as hereinafter mentioned, the said C. D. shall do all the carpenter's work necessary to be done for the completion of the said contract, and referred to in the said plans and specifications, and provide all materials, tools and implements necessary for the performance of such work, and shall do the same in all things according to the said contract and specifications, and shall in all things abide by, perform, fulfil and keep the said terms and stipulations of the said contract, so far as the same are or shall be applicable to such carpenter's work; and that in case the said T. G. shall become liable to pay any penalties under the said contract in consequence of the delay of the said C. D. in the performance of the work agreed to be performed by him, the said C. D. shall pay to the said T. G. the amount of such penalties; and that in case the said W. M. or other surveyor appointed to superintend the works under the said contract shall disapprove of the work done by the said C. D., or the materials used by him, or the manner in which such work is done, it shall be lawful for the said T. G. to dismiss and discharge the said C. D. from the further performance of such work, and employ some other person to complete the same; and that in such case the money which the said T. G. shall pay to the said other person for the completion of the said works shall be deducted from the sum which would otherwise be payable to the said C. D. under this

agreement; AND that for the considerations aforesaid, the said T. G. shall pay to the said C. D. the sum of £ , in manner following: 75 per cent. on the price and value of the work done by the said C. D. during any week, to be paid to him on the Saturday in every week during the continuance of the said works, and the balance within one month after the completion of the said dwelling-house and offices.

III.—*Contract to do Repairs or perform other Works not under the Superintendence of a Surveyor.*

AGREEMENT made the day of , in the year of our Lord , between A. B., of, &c., and C. D., of, &c. A. B. agrees to do all the works hereunder specified in the best and most workmanlike manner, and to provide for such works all necessary materials and things of the best quality, and to complete and finish the said works on or before the day of next; and in case the said works shall not be finished on or before the said day of , to pay or allow to the said C. D., out of the monies payable under this agreement, the sum of £1 for each day during which the said works shall remain unfinished after the said day of ; and that in case the said C. D. shall require any additions or alterations to be made to the works hereunder specified, to execute such additions and alterations in the best and most workmanlike manner, with materials of the best quality: AND it is hereby agreed, that in case any additional works shall be required by the said C. D., or in case the said C. D. shall delay the execution of the said works, the said A. B. shall have such additional time for the performance of the said works, after the said day of , as shall have been consumed in the execution of such additional works, or as the time during which the said C. D. shall have delayed the said works, and that the payments for delay shall not be payable until after the expiration of such additional time: AND it

is hereby further agreed, that materials brought upon the premises of the said C. D. for the purpose of being used in the said works, shall, if of proper description and quality, immediately become the property of the said C. D.; AND the said C. D. agrees to pay to the said A. B. for the said works the sum of £ within one week after the same shall be finished: AND it is hereby agreed, that in case of any addition or alterations being made in or to the said works, the price of such additions or alterations shall be estimated in proportion to the said sum of £ for the whole of the said works, and such price so estimated shall be either added to or deducted from the sum of £ .

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